AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 281

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

ANN WARNER ET AL., HEIRS-AT-LAW OF JOHN G. WARNER, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 14, 1900.
WRIT OF CERTIORARI AND RETURN FILED JULY 10, 1900.

(17,783.)

(17,763.)

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INDEX.

	Page.
Original bill	1
Amendment to bill	19
Answer	20
Agreement of June 7, 1876, for sale of dredge-boats, &c	36
Ordinance No. 3479	42
Ordinance No. 3539	43
Appraisements of T. S. Hardee	43
Copy of drainage warrant	50
Petition for writ of certiorari in case No. 172, of October term, 1899	51
Assignment of errors filed in case No. 172, of October term, 1899	74
Petition for writ of certiorari in this case	80
Answer of respondent	90

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Page
Transcript filed with petition in this case 92
Caption 92
Decree on mandate from United States circuit court of appeals 93
Mandate from United States circuit court of appeals 95
Motion and order making heirs of Warner parties 97
Copy of judgment of civil district court in succession of Warner 97
Decree on mandate of United States Supreme Court 99
Mandate from United States Supreme Court 99
Master's report 102
Master's supplemental report on defendant's exceptions 106
Exceptions to master's report 108
Testimony before master 109
Testimony of S. D. Moody for complainant 110
Robert C. Shortridge for complainant 116
Clark Steen for complainant 117
S. D. Moody for complainant (recalled) 119
James Jackson for complainant 121
Juste Fontaine for defendant 123
Claim of Frank N. Butler *et al.*, filed before master 125
Appearance of Mrs. Frank N. Butler, executrix 126
Claim of F. J. Gasquet, filed before master 127
John Crossly & Son, Limited, filed before master 128
Wilder & Co., filed before master 130
Mrs. Lytle, tutrix, filed before master 131
Suffolk National Bank, filed before master 132
John J. Donaldson, filed before master 132
Schedule 1—Assessment of drainage taxes against the city 133
Schedule 2—Assessment of drainage taxes against private property 134
Motion to file and record mandate of Supreme Court 135
Complainants' additional offering of evidence 136
Defendant's offer of evidence 137
Exceptions to report of master 143
Agreement changing exceptions to master's report 145
Final decree 145
Agreement as to transcript 148
Order allowing appeal 149
Assignment of errors 150
Appeal bond 152
Certificate of clerk 153
Agreement as to supplemental record 153
Amendment to petition 155
Exception and answer 156
Judgment on mandate of United States circuit court of appeals awarding a new trial 157
Mandate 157
Judgment 158
Clerk's certificate 158
Cost bills of clerk of United States circuit court, clerk of United States circuit court of appeals, and of the United States marshal 159
Clerk's certificate 160
Agreement as to additional record 160
Proceedings had in United States circuit court of appeals 161

26041

Page
Argument and submission 161
Decree of the court 161
Petition for rehearing 162
Order denying rehearing 164
Opinion of the court 164
Certificate of clerk 165
Writ of certiorari 165
Stipulation as to return 165
Return to writ of certiorari 166
Stipulation designating record for printing 166

Circuit Court of the United States, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350. In Equity.

Bill in Equity.

Filed Nov. 26, 1894.

To the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

John G. Warner, a resident of the city of Brooklyn and a citizen of the State of New York, brings this his bill on his own behalf as well as on behalf of all other parties holding obligations of the same nature and kind as your orator, who may intervene for their interest herein and may contribute to the costs, expenses and counsel fees incurred in this suit, whose names are numerous and are unknown to your orator, against the City of New Orleans, a municipal corporation of the State of Louisiana and a citizen of said State.

And thereupon your orator complains and says, that by act No. 165 of March 18th, 1858, the legislature of said State provided for the leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, the boundaries whereof are fully set forth in said act—which is made part hereof—and said lands were divided into three draining districts, which were respectively designated, as the first, second, and third draining districts, to which, pursuant to a subsequent act of said legislature, a fourth draining district was added—which will be noticed hereafter—that for the purpose of carrying out the provisions of said act, it was provided by the second section thereof, for the appointment of board of draining commissioners for each of said districts, who were by the fourth section of said act invested with all the rights and powers necessary to drain said several draining districts, and to that end were allowed at all times to enter the lands within said districts, to place engines and machinery thereon to dig drains, to make necessary embankments, and levees, and generally to do all things necessary to be done in draining and reclaiming the lands within said districts, and said boards of commissioners by the fifth section of said act were authorized to sue and be sued.

2. And your orator further shows that by the 7th section of said act said boards of commissioners were each empowered to levee, drain and reclaim in their respective districts as follows: whenever either of said boards of commissioners were ready and prepared to drain their respective sections or districts, such board was directed to cause a plan thereof to be made, accurately designating the limits of the section or district to be drained as far as possible, the subdivisions of the property therein contained and the names of the proprietors, also the dimensions and directions of the canals to be dug, and the

place where the steam-engines would be placed, which plan or plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted in French and English, in two newspapers, once a week for four successive weeks, announcing that said boards of commissioners would proceed to drain such sections, and describing the place where the plan was deposited, accurately defining the limits thereof, and indicating as nearly as possible the time when the draining thereof would be completed, and the possible cost of the work; and said section further provided, that after the publication aforesaid, that said boards of commissioners should apply by petition to one of the courts in said parish of Orleans for the portion of the section or district lying within the limits of said parish, and to the district court in the parish of Jefferson for that portion of the section or district lying within the limits of said parish, which court or courts were directed upon due proof having been made of the publications and notices aforesaid, to decree, that each portion of the property situated within said limits was subject to a first mortgage, lien, and privilege in favor of such boards of commissioners for such an amount as might be assessed upon such section or district, and interest thereon, at six per cent. per annum from demand thereof, which decree of the district court of the parish of Orleans was directed to be recorded in the office of the recorder of mortgages for said parish, and the decree of the district court for the parish of Jefferson was directed to be recorded in the office of the recorder of said parish, which lien, privilege, and first mortgage, it was further declared by said section should take precedence over all mortgages, liens, privileges, whatsoever, whether tacit, conventional, legal or judicial, and should attach to the property until the amount assessed and the interest thereon should be fully paid.

3. And your orator further shows that by the eighth section of said act said boards of commissioners were each within their respective districts or sections, given the right and authority and power to levee such uniform assessment or assessments upon the superficial or square foot of lands situate within the draining section or district of such board to defray the expense of the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of said act, as applicable to its particular district, which assessment was to be collected from time to time, as the wants of such boards might require; and by the ninth section of said act it was provided that for non-payment of said assessments, judgments should be recoverable therefor before any court of competent jurisdiction and the lands assessed should be sold according to law.

4. And your orator further shows that an act supplementary to the above act, No. 165, approved March 18, 1858, was duly passed by the legislature of Louisiana, and approved March 17, 1859, being No. 191 of that year, by which it was enacted in the first section thereof, that *that* to enable said boards of commissioners to carry into effect the provisions of said act No. 165, approved March 18

1858, and to commence the works therein contemplated, that each of said boards of commissioners should have power and authority to issue bonds in the sum — $500, having not more than thirty years to run and bearing interest, not exceeding 8 per cent. per annum, to be designated "draining bonds," which were not for any one district to exceed $350,000; and by the second section of said supplementary act, it was provided that it should be the duty of said boards of commissioners, upon issuing the bonds aforesaid, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of each board or boards, in accordance with the provisions of the aforementioned original act, approved March 18, 1858, and fix and apportion the amount to be paid yearly, by the owners of said lands in order to pay the annual interest on said bonds as might mature, and the manner of redeeming such bonds was provided for in other sections of said act, as will appear from a reference thereto, which is made a part hereof.

5. And your orator further shows that the legislature of the State of Louisiana, by act approved March 1, 1861, being No. 57 of that year, and entitled "An act to provide for the collection of the assessments for drainage, under the acts of March eighteenth, eighteen hundred and fifty-eight, and the supplementary act thereto of March seventeenth, eighteen hundred and fifty-nine," enacted that the amounts of assessments, which the boards of the several draining districts were authorized to affix and apportion, to be paid yearly by the owner or owners of the land within said districts, in order to pay interest on the bonds issued, or to be issued by said boards of commissioners, and such bonds as might mature by virtue of the second section of said supplementary act No. 191, approved March 17, 1859, should be collected and sued for as follows, to wit: as soon as any assessments had been made notice thereof should be given, a copy thereof should be filed in the third district court of New Orleans for all the assessments on the property within the limits of the parish of Orleans, and in the third judicial district court sitting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, and on which tableau of asssessments thus to be filed the property assessed should be set forth with the amounts assessed, and the names of the owners thereof, if known, and if the owners' names were unknown, then it should be so stated in said assessment-roll that the property assessed belonged to owners unknown; that a petition should be filed with said assessment-roll praying for an order that all persons whom it might concern do show cause within thirty days from the first publication of said order, if any they had, why said assessment-roll should not be approved and homologated; that said order thus rendered should be published in the French and English languages at least twice a week for thirty days, in one newspaper published in New Orleans, as to the order of the third district court of New Orleans, and in one newspaper published in the parish of Jefferson, as to the order of the third judicial district court sitting at Carrollton, and that after said publications the said courts should, on motion of counsel of

said boards of commissioners, approve and homologate said assessment-rolls, which should be a judgment against the property assessed and the owners thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings, and that the court should at the same time and in the same judgment order the delinquent parties to pay 10 per cent. in addition to the amount assessed, to pay costs and counsel fees.

6. And your orator further shows that afterwards, to wit: in the year 1871, the legislature of the State of Louisiana, by act No. 30 of that year, authorized and empowered the Mississippi & Mexican Gulf Ship Canal Company, a corporation then existing and domiciled in the city of New Orleans, to excavate drainage canals, and build protection levees within the limits of New Orleans and Carrollton, on certain terms and conditions expressed in said act, and by the second section thereof said company was authorized and empowered to dig a canal and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city and near the shore of Lake Pontchartrain, the exact location of said canal and levee, and of all canals to be dug and levees to be built by said company to be designated and fixed by the board of administrators of said city of New Orleans, and by the fourth section of said act, said Mississippi & Mexican Gulf Ship Canal Company was authorized to build a canal and protection levee below the city of New Orleans to connect the lower end of the protection levee along the lake with the Mississippi river, of a sufficient size to fully protect the city from overflow, and on a line to be designated by said board of administrators of said city, and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by said board of administrators, the object of these two canals and protection levees being the protection from overflow, of the area between the Mississippi river, Lake Pontchartrain, and said lower and upper protection levees; and by the fifth section of said act said canal company was authorized to dig all the smaller canals required for the drainage of New Orleans and the lands in the rear of the city, of the dimensions of ten feet or more in width; and by the sixth section of said act, it was the duty of said board of administrators of the city of New Orleans, immediately after the passage of said act, not only to locate the lines of the canals and protection levees specified in the various sections of said act, but they were also required to build and run all pumps and drainage machines necessary to lift the drainage water from the said canals over into Lake Pontchartrain and keep the water in said canals in process of excavation as far as practicable at a proper level for the work of excavation, and at the same time assist the draining of the adjacent lands; and by the eighth section of said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed by said board of administrators for the purpose, to examine the work done by the said Mississippi & Mexican Gulf Ship Canal Company during each month, and upon measurement of the width and depth of the canals, or parts of canals, dug and protection levees built to certify as to the cubic yards ex-

cavated and the number of cubic yards of protection levees built during said month, and that it should be the duty of the administrator of accounts on the presentation to him of said certificates of the city surveyor or engineer appointed as aforesaid, to draw a warrant or warrants on the administrator of finance in payment of the work so done, at the rate of fifty cents per cubic yard for excavation, and fifty cents per cubic yard for the protection levees built, the said warrants to be of such denominations as might be required by the president of said company, and these warrants it was the duty of the administrator of finance to pay on presentation to him in case there was any fund in the treasury to the credit of the said Mississippi & Mexican Gulf Ship Canal Company, but should there not be sufficient funds to cash said warrants, then said administrator of finance was by said act required to endorse upon the same the date of presentation, after which date the said warrant or warrants bore interest at the rate of 8 per cent. per annum until paid; and by the ninth section of said act it was enacted that in order to provide funds for the payment of work to be done by the said company, that the three boards of commissioners for the draining districts of New Orleans and Jefferson established under acts of March 18th, 1858, March 17th, 1859, and the several acts amendatory thereof, and any and all other person or persons or corporations who might have been in possession, should transfer to the board of administrators of New Orleans, all money, assessments, and claims for drainage in their hands or under their control, all titles to real estate, all books, plans, tableaux and judgments in favor of commissioners, the office furniture of said drainage commissioners, a true statement of the claims of drainage commissioners against the city of New Orleans to be adjudicated and settled out of the money collected by the city of New Orleans and pertaining to said drainage districts, and that the board of administratrators of New Orleans should be and were *were* thereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of said several drainage districts or any other corporation charged with the duty of draining and leveeing within the limits of the city of New Orleans and Carrollton and the said board of administrators were directed to collect from the holders of property within said drainage districts the balance due on the assessments as shown by the books of the first, second, and third drainage districts under acts of March 18, 1858, that of March 17th, 1859, and the several supplementary and amendatory acts thereto, and which assessments were thereby confirmed and made exigible, and further, to make assessments of two mills per superficial foot in those parts of the drainage districts as existing and created by said acts of March 18, 1858, and March 17th, 1859, and amendments thereto, and on such other lands as should be brought within the protection levees contemplated by said act 30 of 1871, where no assessments had been made, and to execute and enforce the same as provided by the several acts of the legislature creating and regulating said boards of drainage commissioners, and that all money received by said boards of administrators from the said commis-

sioners of drainage, the collection of claims for drainage then due, from the collection of assessments, and from any of the sources of revenue contemplated by the provisions of the aforesaid section nine, should be placed to the credit of said Mississippi & Mexican Gulf Ship Canal Company, to be held as a fund to be applicable to the drainage of New Orleans and Carrollton (which was a virtual consolidation of all of said districts and said additional territory brought within said protection levees), in accordance with the provisions of said act, and that all property not money, so received, should be held in trust for the payment of said Mississippi & Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage, provided, that all the rights and powers and facilities possessed and enjoyed by said boards of administrators of New Orleans relative to drainage should be so construed as not to conflict with the rights, facilities acquired by said company in excavating canals and building levees, as stipulated in the various sections of said act; and the twelfth section provided that said act should be favorably construed so far as to favor all the purposes and objects of said act, and the operations and provisions thereof, all of which will more fully appear by reference to said act No. 30 of the year 1871, which is made a part hereof.

7. And your orator further shows that on the 7th of February, 1872, under and pursuant to said act 30 of 1871, said board of administrators of the city of New Orleans adopted an ordinance creating the fourth drainage district, which embraces those other lands not embraced within the first, second and third draining districts, but were brought within the protection levees contemplated by said act where no assessments had been made or levied, as will more fully appear by reference to a copy of said ordinance herewith filed and made part hereof and marked "ordinance No. 1359."

8. And your orator further shows that said boards of drainage commissioners were duly appointed, qualified and entered upon the duties imposed upon them by the various acts of the legislature hereinbefore referred to, for the first and second drainage districts, and pursuant to said acts, respectively prepared, filed and deposited in the office of the recorders of mortgages of the parishes wherein the land to be drained was situated, their plans, designating the lands therein to be drained, the subdivisions of the property therein contained, the names of the proprietors, the dimensions and directions of the canals and the places where the engines were to be located; and after due publications of the notices as required by said acts that said commissioners would proceed to drain said lands, naming the place of deposit of said plans and defining the limits of the lands to be drained, and including as nearly as possible the time required for the completion and the probable cost of the drainage; and on the petition of said commissioners, decrees were rendered by the district courts designated by said acts, that such portion of said property within the limits of the section or district to be drained, and exhibited by the plans was subject to a first lien,

privilege, and mortgage, in favor of said commissioners for such amounts as might be assessed upon said property for its part of the costs of drainage, with interest thereon *with* six per cent. per annum from demand, and subsequent like liens, privileges and mortgages were decreed at the suit of the board of administrators of New Orleans in said third and fourth drainage districts, said decrees, the courts rendering the same, the dates of rendition and the title of the proceeding are as follows, to wit:

The judgment "In the matter of the commissioner- of the first draining district, praying a decree of mortgage privilege," etc., rendered by the third district court of New Orleans in suit No. 16269 on the docket of that court on the 24th day of August, 1861; the judgment "In the matter of the commissioners of the second draining district praying for a decree of mortgage privilege," etc., rendered by the third judicial district court of Jefferson in suit No. 1938, on the docket of that court rendered and signed on the 29th of April, 1861; the judgment "In the matter of the board of commissioners of the second draining district praying," etc., rendered by the third district court of New Orleans, in suit No. 15846, on the docket of said court rendered and signed on the 9th day of February, 1861; the judgment "In the matter of the city of New Orleans praying for a decree of mortgage privilege," etc., upon property in the third draining district (said city acting under said act 30 of 1871), duly rendered by the eighth district court, parish of Orleans, being No. 7482 on the docket of that court, on the 4th day of May, 1872; and the judgment "In the matter of the board of administrators praying for a recognition of mortgage and recovery of assessments in the fourth draining district,"—said board of administrators herein also acting under said act 30 of the year 1871—rendered by the superior district court, parish of Orleans, in suit No. 807 on the docket of said court, on the 29th day of January, 1873, and signed on the 3d day of February, 1873, copies of judgments are herewith filed and marked Exhibits "A," "B," "C," "D," and "E," and which were respectively recorded in the mortgage office where the land to be affected thereby was situated, as follows, to wit: 1st drainage district, in the mortgage office for the parish of Orleans, April 17, 1872; and April 6, 1882; second draining district, parish of Jefferson, April 29, 1861, and December 12, 1871; second draining district, parish of Orleans, April 11, 1861, and December, 1871; third draining district in the mortgage office for the parish of Orleans, May 11, 1872, and April 6, 1892; and in the fourth draining district, in the mortgage office for the parish of Orleans, February 8, 1873.

9. And your orator further shows that under the authority conferred by the aforesaid acts of the legislature the board of commissioners of the first draining district on the 12th day of September, 1861, levied an assessment of 3.3 mills per superficial foot on the lands within said district, to pay the cost of drainage directed by said acts; that on the 11th of March, 1861, the board of commissioners of the second drainage district levied an assessment of two mills per superficial foot on the lands of said district to pay the cost

of drainage of said lands under the same authority; that on the 11th of June, 1872, the board of administrators of the city of New Orleans, then vested with power to make assessments by virtue of said act 30 of 1871, levied an assessment of two mills per superficial foot on all lands within said third district to pay the cost of draining said lands; and on or about the 20th of November, 1872, the said board of administrators, in the exercise of the authority conferred by said act 30 of 1871, levied an assessment of two mills per superficial foot on lands within the aforesaid fourth draining district, to pay the cost of draining said lands, all of which will more fully appear by reference to the resolutions of said boards of commissioners and ordinances of the common council of said city of New Orleans, copies of which are herewith filed and made part hereof, and marked respectively "assessment 1," "assessment 2," "assessment 3" and "assessment 4."

10. And your orator further shows that the tableaux required by the provisions of said act No. 57 of the year 1861, exhibiting the amounts assessed for such drainage, the names of the owner- of the lands as known, and where unknown stating the owners were unknown, were duly filed in the courts hereinbefore mentioned in accordance — the provisions of said act, and on motion and after due publication of said orders that all persons concerned show cause why said assessment-rolls should not be approved and homologated, said tableaux or rolls of assessment were duly homologated and approved by judgments of said courts, which by the terms of said act No. 57 of 1861 were and are judgments against the aforesaid lands as well as the owners thereof, for the amounts assessed and 10 per cent. costs and counsel fees and said judgments, the titles of the proceedings, the courts rendering the same, and the dates of rendition are as follows: "In the matter of the commissioners of the first draining district," etc., No. 17828, third district court, parish of Orleans, homologating the assessment-rolls for said district, for the first instalment of 10 per cent. thereof, rendered March 11, 1863, and No. 25935, superior district court for the parish of Orleans, for the remaining nine instalments, from the second to the tenth, both inclusive, was rendered March 21, 1874.

"In the matter of the commissioners of the second draining district, praying," etc., No. 1938, the judgment homologating the assessment-roll of said district, above Toledano street, New Orleans, was rendered by the third judicial district court for the parish of Jefferson on the 15th and signed on the 23d March, 1869.

"In the matter of the commissioners of the second draining district, praying," etc., No. 15846, the judgment homologating the assessment-rolls of said district below Toledano street, New Orleans, was rendered by the third district court for the parish of Orleans on the 11th and signed on the 16th November, 1868.

"In the matter of the city of New Orleans, praying for the homologation of assessment-roll," etc., for the third draining district, the judgment homologating said assesment-rolls was rendered on the 8th and signed on the 13th day of November, 1872, by the eighth district court of the parish of Orleans.

"In the matter of the board of administrators, praying for a recognition of mortgage and recovery of assessments in the fourth draining district," No. 807, the judgment of homologation of the assessment-rolls for said district was rendered on the 15th and signed on the 18th of March, 1873, by the superior district court of the parish of Orleans, all of which judgments are specially referred to for greater certainty, and copies of the same are made part hereof and are marked respectively, "homologation 1," "homologation 2," "homologation 3," "homologation 4" and "homologation 5;" all of said courts so rendering said judgments, outside of said third district court, having become possessed of jurisdiction over said matters under authority conferred on them by the legislature of the State passed subsequent to said act No. 57 of 1861. And for the revival of all of which judgments, as a matter of excessive precaution and not because the same were necessary proper proceedings were in proper time taken in the proper courts and are still pending therein.

11. And your orator further shows that said board of administrators complied with said act 30 of the year 1871, and took possession of all the money, rights, privileges, properties and powers conferred on them, and became possessed of all the means necessary to carry out the objects of the statutes aforesaid and provide for the payment of all drainage warrants that might be issued under said act 30 of 1871 and that the amount of assessments handed over to said city of New Orleans, in the 1st and 2d draining districts was $790,621.42, and the amount of assessments levied and reduced to judgment at the suit of the city of New Orleans in said 3d and 4th draining districts, after she came in control under said act No. 30 of 1871, was $909,915.74, making a total of $1,699,637.16 of which there was assessed against the city of New Orleans on streets and squares as follows: 1st district, $223,110.60; 2d district, $199,885.47; 3rd district, $207,441.46; 4th district, $65,956.77, and on which assessments there had been collected from individuals by said city of New Orleans, between the time she took charge as aforesaid and the 7th day of June, 1876—the date of the sale from Van Norden and said canal company hereinafter referred to—in cash $78,748.51, and $151,174.18 in drainage warrants, paid in pursuance of an ordinance No. 2460 hereto annexed and made part hereof, leaving outstanding and due on the books and records a balance of $1,469,714.47, including said sums due by the city of New Orleans on said assessments levied on her streets and squares as aforesaid.

12. And your orator further shows that on the 22nd day of May, 1872, said Mississippi & Mexican Gulf Ship Canal Company, by act before Andrew Hero, notary public, for a good and valuable consideration therein expressed, did assign, transfer and set over to Warner Van Norden all and singular the right, title and interest, claim and demand of said canal company in and to the privileges and advantages granted to it under the aforesaid act No. 30 of 1871, as will more fully appear by reference to a copy of said act herewith filed and made part hereof; and on the 22nd day of November, 1872, said canal company by another act before the same notary,

for a valuable consideration therein expressed, did sell and deliver unto said Van Norden all of its dredge-boats, derricks, flat-boats and other property used in dredging, as will more fully appear by reference to a copy of said act of sale herewith filed and made part hereof.

13. And your orator shows that from the time said board of administrators took possession and charge in June, 1871, pursuant to said act 30 of 1871, a vast amount of drainage work was done by said canal company and said Warner Van Norden, transferee thereof; twelve miles of old canals were widened and deepened, and thirteen miles of new canals were dug, and a corresponding amount of protection levees were built, and in the doing of which over 5,000,000 cubic yards of earth were handled, and the work so done by said company and said Van Norden, transferee, was in all respects conformable to the acts of the legislature and the designs of said board of administrators, who duly approved and accepted all work done, and was adequate to secure said proposed drainage, and only required the completion of a gap on the shore of Lake Pontchartrain, and the placing in position of the pumping engines on said lake shore—which it was the duty of said city of New Orleans to do under said act 30 of 1871 to complete the entire system.

14. And your orator further shows that by act No. 16 of the legislature of Louisiana, approved March 24, 1876, and made part hereof, the city of New Orleans was authorized and empowered to contract with said Mississippi & Mexican Gulf Ship Canal Company and said Van Norden, as transferee thereof, for the purchase of its said transferee's rights, franchises, tools, implements, machines, and boats and apparatus, the purchase price to be paid in drainage warrants, payable out of drainage taxes imposed under the various acts of the legislature hereinabove set forth, and after due appraisement, on the 6th day of June, 1876, said purchase was made by said city by notarial act (a copy of which, as well as of an inventory of the property sold, and the ordinance under which said inventory was made, are hereto annexed and made part hereof, and marked "transfer 1" and "inventory 1," and ordinance No. 3479, A. S.), the city receiving from said company and said transferee, said boats, machinery, implements and apparatus of great value, for which it agreed and bound itself to pay in drainage warrants $300,000.00 which were delivered to said Van Norden transferee as aforesaid, pursuant to ordinance No. 3539 A. S. copy of which is annexed and made part hereof, and of which your orator is now the owner and holder of three, of $2,000 each, by him endorsed (a copy of one of which is also annexed and made part hereof) all dated June 6th, 1876, upon which this suit is brought, as well as upon the assignment, transfer and subrogation of said Warner Van Norden to your orator, of all his right, title and interest in and to said warrants, as well as of each, any and all right or rights of action which he had or has against said city of New Orleans arising in his favor out of said act of sale of said June 7th, 1876, or the action of the city of New Orleans thereunder by reason of its failure to collect said drainage taxes out of which said warrants given for the purchase

aforesaid were payable, or by reason of the failure of the city of New Orleans to complete said drainage work, to the end that said taxes might all be collectible, so as to pay said warrants given for said purchase, or for any other reason, of which a copy is herewith filed and marked "assignment 1," and he brings this suit not only for himself, but for such other holders of said drainage warrants, given for the purchase aforesaid, as may under the invitation hereinbefore extended make themselves parties to this suit.

15. And your orator further shows, that said Van Norden, at the time of parting with said drainage warrants in the year 1876, as well as at the time of making said assignment and transfer marked "assignment 1" was, and now is at the time of bringing this suit, a citizen of the State of New York and could bring this suit in this hon. court.

16. And your orator further shows that said act of the legislature of Louisiana of February 24, 1876, being No. 16 of that year, providing for the payment of the purchase price of said dredge-boats, tools and implements, by the issuance and delivery of drainage warrants, payable out of drainage taxes, was a new destination of said taxes by the legislature of the State as they then stood, which could not be diverted until said drainage warrants, so given as aforesaid, were fully paid, and placed said taxes beyond any claim that might be urged against them by the city of New Orleans, or any other party or person whomsoever, and especially as said city became the absolute owner of said dredge-boats, franchise and implements without paying any of her own money or property, or giving any personal obligation therefor.

17. And your orator further shows that after said purchase said city of New Orleans alone, became possessed of the sole power, authority, as well as the necessary tools and outfit to complete the contemplated system of drainage, and in fact construct and complete any system of drainage, and had the duty cast upon her to complete said system, or build and complete some other system of drainage, but from the very date of said purchase in June, 1876 (and notwithstanding said drainage work had, from the very commencement thereof by said canal company in 1871, and the prosecution thereof by Van Norden as transferee of said company, from May, 1872, been proceeded with, with great vigor and over two-thirds thereof had been completed) said city of New Orleans ceased all work on said system, and never thereafter commenced or prosecuted any other, but sold some of the boats and machinery so purchased as aforesaid, diverted the proceeds of taxes from other purposes than the payment of drainage warrants, allowed other of said boats to rot and sink unused, and all notwithstanding all were in a first-class condition when received from said vendor, with all the outfit in duplicate parts, so that if any was broken or gave way a counterpart was on hand to take its place, and which with reasonable care would have been useful for ten years from the date of said purchase, and thus rendered herself incapacitated for the completion of the drainage work aforesaid or for any work of drainage whatsoever, and allowed the canals dug by said company and its

transferee to fill and remain filled with filth and sediment, and thus became useless and worthless, and in fact destroyed the vast amount of work already done to a very large extent.

18. And your orator further shows that ever since said purchase by said city she has done nothing to compel or enforce the collection and payment of drainage taxes, and but one execution has been issued on said drainage-tax judgments since June, 1876, and when this was enjoined by a preliminary injunction, no steps have ever since been taken to have said injunction tried or disposed of, and in fact said city has done nothing toward the collection of said taxes but keep an office open in the city hall where the agent of Van Norden might try to induce drainage-tax debtors, by persuasion to pay their taxes, where your orator has been informed some taxes have been paid but the amount thereof is unknown to your orator, and the same have never been accounted for, and finally after this system of inaction and supineness, said city of New Orleans on the 5th day of April, 1881, adopted by its common council an ordinance, and had the same published in the daily press of New Orleans, instructing its mayor to issue, and in pursuance thereof he did issue and publish his proclamation advising drainage-tax payers not to pay their taxes (which had a most disastrous effect upon the payment thereof), and by reason of her conduct in not completing the said system of drainage or *and* because thereof, and because she had not adopted any other system of drainage, to drain the land whereon said assessments were imposed and remained unpaid, the supreme court of Louisiana, in the case of Davidson *vs.* New Orleans, in March, 1862 (34 La. Ann., p. 170 to 178) decided said drainage taxes could not be enforced and collected, and this decision, from the date thereof, has become the settled jurisprudence of the State, and been the basis of many suits in the courts of Louisiana, in which large amounts of drainage taxes have been erased and canceled, and all the balance thereof remaining unpaid have become of little or no value; and after the rendition of said Davidson decision said city of New Orleans, on the 15th of May, 1883, in the further prosecution of its purpose to destroy said drainage taxes and dissuade those owing the same not to pay the same, by a report of a committee of its council, duly published, pointed out to the drainage-tax payers how under said Davidson decision they might avoid payment thereof, to wit, by bringing proceedings against said city as trustee of said drainage taxes, and alleging that the drainage work (which it was the duty of the city of New Orleans to complete) had not been completed, and that because thereof said drainage taxes could not be enforced, which suggestion and programme so put forth by said city while trustee of said fund and the collection thereof, has ever since been largely adopted and enforced and very large amounts of drainage taxes have been ordered erased and have been erased and lost in consequence thereof, that when said proceedings were brought said city of New Orleans made no defence whatever, but in accordance with the determination to destroy said fund, never called a single witness to show the value of the work done and the benefits resulting therefrom, and of all of

which she had full knowledge, but of the exact extent of said proceedings and the exact amount of drainage fund thereby destroyed your orator has no exact knowledge, except of one case, to wit, the proceedings instituted to cancel and erase the drainage taxes on a portion of the land known as the Foucher tract in the 2d drainage district, to wit, that part thereof lying on the swamp side of St. Charles street between Fabourg Greenville and Fabourg Burtheville, in the suit entitled C. E. Girardy *et al. vs.* Heirs of William Henry, No. 23315 on the docket of the civil district court, where the city of New Orleans, although a party to said proceedings, and having full knowledge of the benefits conferred on said land and other land in the vicinity by said work of drainage, and that the same was drained never called a single witness to prove the fact but suffered the matter to go by default, and in consequence thereof on the 12th day of June, 1889, the court ordered the drainage taxes assessed against said land amounting to $11,532.00 with 6 per cent. interest per annum from December 7, 1877, and 10 per cent. attorneys' fees and costs to be erased and canceled from the drainage records and the mortgage office, which has since been done and said amount has been wholly lost to said drainage fund.

19. And your orator further shows that said city has in other ways and by other means, the details of which are at present unknown to your orator destroyed said drainage fund and discouraged, and advised against the payment of said drainage taxes, until now, as far as the courts of Louisiana are concerned, the same has become uninforcible and worthless to the holders of drainage warrants given for the purchase of the aforesaid dredge-boats, tools, implements and franchise, which said city, from the date of said purchase up to the present time, has not paid for in whole or in part in drainage taxes or otherwise provided any means for the payment of said warrants, or offered any restitution of said property, and all in express violation of an express covenant contained in said act of sale "not to obstruct or impede, but on the contrary to facilitate by all lawful means the collection of said drainage-tax assessments, until said warrants should be paid in full."

20. And your orator further shows that on some occasions said city has claimed said drainage taxes as her own property and been allowed the full benefit thereof in the payment of her own debts, and especially in suit No. 2036, civil district court, and No. 2447, late superior district court for the parish of Orleans, wherein, being sued as indebted to the commissioners of the city park in a large sum of money, she claimed said sum so sued for should be credited with drainage taxes amounting to $25,725.96 assessed against another portion of said Foucher tract in said second drainage district lying between said Fabourg Greenville and Fabourg Burthville aforesaid, and between St. Charles street and the Mississippi river, which credit was allowed to said city in discharge of her own indebtedness, to the expense and loss of said drainage fund, and for which with interest at 6 per cent. per annum from the date of allowance she should account to the holders of said drainage warrants given for said purchase.

21. And your orator further shows that he is advised that said defendant now claims that she has not in her possession any funds realized from drainage-tax assessments, against other property than the streets and property for which she is liable, and that none of the taxes assessed on property of private individuals is now susceptible of collection.

22. And your orator further shows that the plan for draining and reclaiming the land aforesaid, as provided for in said act 30 of 1871, and as supplemented by the board of administrators of said city of New Orleans under the authority given, and the duty imposed on them under said act, and which they neglected and destroyed as aforesaid, was, first, to surround the territory embraced in said four drainage districts with immense levees to prevent any water from flooding the same from without, as follows: On the south by the levee on the bank of the Mississippi river; on the east by a lower protection levee; on the north by the lake-shore protection levee (which was to be not less than 100 feet wide at its base, and of sufficient height to completely protect said land from overflow from the lake); and on the west by an upper protection levee; and, second, the plan for removing all water and drainage that might accumulate within the territory so protected from overflow as aforesaid, was, *to* immediately inside of said protection levees above or on the west, and below or on the east, to dig immense canals leading directly into another immense canal to be dug immediately inside of said lake-shore protection levee on the north, which was to be not less than 65 feet wide and 15 feet deep, which was to serve as a reservoir canal, from which the drainage emptying therein was to be pumped into said Lake Pontchartrain as hereinafter stated; and into said reservoir canal other canals of large size were *lead* parallel with said canals inside of said upper and lower protection levees, and at proper distances, according to the topography of the land, other and smaller canals were to be dug at right angles and connecting with and emptying in said reservoir canal inside of said lake-shore protection levee.

23. And your orator further shows that said levee on said bank of the Mississippi river was, and ever since the year 1871 has been sufficiently high and strong to protect said enclosed territory from any overflow from said river front and that the land on said river front to Claiborne street in said city (about one-third of the distance from said river to said Lake Pontchartrain), descends or falls towards said lake about 16 feet, while the land at said Claiborne street is only one foot higher than it is at said lake, and that to provide for this condition of things the drainage from the levee on said Mississippi River front was over the surface of the ground, and in the street gutters to Claiborne street aforesaid, where the aforesaid right-angle canals running east and west, and emptying into said upper and lower protection canals were to be dug, and at proper distances continued towards said reservoir canal; and the other canals which *lead* northwardly from said Claiborne canal and parallel with said upper and lower protection canals and emptying into said reservoir canal were to be begun at or near said Claiborne Street canal, and

were to descend from said point gradually increasing in depth until they reached said reservoir canal at a depth of fifteen feet, thus making a complete and continuous descent or fall for drainage from the levee on the Mississippi river in front to the bottom of said reservoir canal on the inside of said lake-shore protection levee in the rear, of thirty feet or more; and said reservoir canal was at all times to be kept empty and free for the flow of drainage therein, by four immense pumping engines to be built and run by the city of New Orleans (but not from drainage-tax collections), on said lake-shore protection levee over which they were to throw said drainage into said Lake Pontchartrain; and your orator avers that said plan or system of drainage was well devised, wise, complete and sufficient, and had the endorsement of the ablest engineers in the country, and if carried out and completed by said city of New Orleans after the purchase aforesaid, would have protected the lands embraced within said plan from overflow from without, and would have easily, quickly and completely removed all the drainage from within the levees provided for thereby, and rendered the land fit and useful for either agricultural, residence, and business purposes, and made the same of many times the value of all drainage taxes imposed thereon, and said taxes themselves collectible and available for the payment of the drainage warrants given for the purchase aforesaid.

24. And your orator further shows that at the time of said sale by said Van Norden and said canal company to said city of New Orleans said drainage assessments then uncollected—and all exclusive of the taxes imposed on swamp land in the first and second drainage districts, which had been settled for prior to said purchase and sale—amounted to the said sum of $1,469,715.41 and that after said sale and purchase said city had not only the power and authority, the machinery and outfit, to have completed said system of drainage, or to have adopted and completed any other system, that would have drained said lands and made them available for the payment of the drainage warrants given for the purchase aforesaid, but she had in addition to all this, from the very date of said purchase, an unexhausted and unrestrained power of taxation under which, by a tax on all the property within the city of New Orleans, she could have supplied herself with more than sufficient means to have completed said system, or any other system, but in violation of her duty and in utter repudiation of her obligations, she did at once abandon all pretence of draining in any way whatever, and destroyed the very source from which she had bound and obligated herself to pay the warrants given for said purchase, sometimes pretending that said drainage taxes were illegal and unconstitutional by reason of various acts of the legislature of the State, to wit: Act No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes, and canceling and annulling all judgments for drainage of said lands, and all legal proceedings pending therefor, act No. 67 of the year 1877 declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed; and section 42 of act

20 of the year 1882, which undertook to abolish all laws providing for drainage, and the drainage-tax assessments and judgments imposed thereunder, all of which your orator avers were illegal, null and void because repugnant to the Constitution of the United States, and especially article 1, section 10, and the 14th amendment of that instrument, prohibiting all legislation impairing the obligation of contracts and protecting the rights of property, and at other times pretending that said taxes were uncollectible because the lands were not worth the amounts imposed thereon—which your orator also avers is without foundation in fact—the only reason (if any) why the land on which said taxes are levied are not worth the amount of said taxes—which is denied—is because said city of New Orleans has refused to drain them, either by completing the system or by keeping the canals already dug open and clean.

25. And your orator further shows that by said act of purchase and transfer of June 7, 1876, and the stipulations therein contained, said city of New Orleans, in addition to the former duties on her imposed of trustee for the collection and payment of said drainage taxes for drainage warrants, became the voluntary and contractural trustee for the collection of the taxes then due, and was bound to use her utmost efforts for the collection of the same under the terms of said act of sale, and to disregard all the illegal and unconstitutional acts of the legislature aforesaid, and having failed and neglected so to do, and having done everything in her power to destroy said taxes and defeat their collection, and this notwithstanding various suits brought against her for her dereliction of duty in this regard, and especially in the face of the following cases, to wit: John Crossly & Sons, Limited, *vs.* The City of New Orleans, No. 9384, U. S. circuit court, eastern district of Louisiana, filed April 18, 1881, and excepted to May 11, 1881; State of Louisiana, *ex rel.* John Crossly & Sons, Limited, *vs.* City of New Orleans, filed December 28, 1881, in the civil district court, parish of Orleans, and subsequently removed to this hon. court and filed therein on the 22 day of April, 1882, being now No. 9935 on the docket thereof; John Crossly & Sons, Limited, *vs.* The City of New Orleans, No. 10337 on the docket of this hon. court, filed August 24, 1883, and pleaded to Nov. 17, 1883, and James W. Peake *vs.* The City of New Orleans, No. 11614 on the docket of said court, filed August 10, 1887, (the pleadings in which are referred to for greater certainty, and which your orator prays may be taken as a part hereof), she has become accountable to your orator and other holders of drainage warrants, for all moneys collected and not paid for drainage warrants, for all moneys misapplied, and also for such sums as might have been collected had said city done her duty in the premises, and which have become lost and wasted, because of said non-fulfilment of her duty as contractural and voluntary trustee, between the time she took charge in June, 1871, to the time a receiver was appointed by this hon. court in June, 1891, in suit No. 12008, on the docket thereof, and more especially between the date of the sale aforesaid from said Van Norden and said canal company on June 7th, 1876, to said June 13th, 1891.

26. And your orator is advised and shows to the court that defendant The City of New Orleans—will set up and plead as a discharge to this suit that she has discharged herself from all liability to account for drainage taxes which she has collected or ought to have collected for the benefit of the holders of said warrants, by the issue and delivery, between May 10th, 1872, and December 31st, 1874, of $1,672,105.21, of her bonds of the drainage series, issued and delivered pursuant to section 17 of act No. 73, of the year, 1872, or some other act, to take up drainage warrants issued for work done pursuant to act No. 30 of the year 1871, but your orator avers that the city of New Orleans had not at any time prior to the date of said act No. 16, approved February 24th, 1876, or prior to the execution of said contract of purchase dated June 7th, 1876, made pursuant to that act, asserted or claimed that she had ever been so discharged, but had at all times acted upon the theory that said bonds were issued in discharge of a fixed liability cast upon her by said section 17, of said act No. 73 of 1872, and your orator is advised and so charges that said act No. 16 of 1876, was an authority for the city of New Orleans to purchase said drainage boats, tools, implements and franchise, and was a legislative recognition that the drainage fund as created by law, and as it stood on the records of the city of New Orleans, and as recorded in the mortgage office had not been discharged in any manner or to any extent by the issuance and delivery of said bonds, and was an appropriation of so much of said fund as would be necessary to pay the said purchase warrants without offset or impairment by reason of the issue and delivery of said bonds of said drainage series.

27. And your orator avers that the said contract of purchase was entered into in view of and in consideration of the provisions of said act No. 16 of the year 1876, and its effect upon the rights and remedies of the said Van Norden, that neither at the time of entering into said contract, nor when said warrants were delivered in discharge of the price of the sale, did defendant disclose to said Van Norden that she would claim that the issuance and delivery of said bonds had discharged her of liability to account for and apply drainage taxes and funds—including those due by herself, to the payment of the warrants so issued to him, but on the contrary, defendant in and by said contract of sale, and the covenants therein contained, recognized and asserted the existence of said drainage taxes as applicable to the payment of said warrants, and agreed "not to obstruct or impede, but on the contrary, to facilitate by all lawful means, the collection of drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed between the said parties hereto that the collection of drainage assessments shall not be diverted from the liquidation of said warrants and payment of expenses as hereinbefore provided for, under any pretext whatever, until the full and final payment of the same," and said Van Norden, who was ignorant that said city claimed or would claim a discharge from liability on account of the issuance and delivery of said bonds of said drainage series, would

not have entered into said contract if he had been advised that any such claim would be made as a defense herein, and so your orator is advised and avers that the defendant is now estopped in equity and good conscience from pleading or maintaining said defence; and your orator avers that he has made amicable demand upon defendant for the payment of his warrants, but without avail.

To the end therefore that said defendant may under oath, according to its best and utmost knowledge, information and belief, full, true and direct and perfect answer make to this bill and the interrogatories hereinafter numbered and set forth at the foot of this bill, and that an account may be taken of all drainage taxes, assessments, and judgments imposed and rendered under acts No. 165 of March 18, 1858, No. 191, of March 17, 1859, No. 57 of March 1, 1861, and act No. 30 of 1871, and the various acts of the legislature of Louisiana supplementary thereto and amendatory thereof, and of all moneys collected by said city of New Orleans under the aforesaid acts, and of any and all other assets and property that came to said city of New Orleans under the aforesaid acts of the legislature or any of them, as well as of each, any and all payments, disbursements and dispositions thereof, and that a further account be taken of all losses, waste of, and damage caused by said city of New Orleans to said drainage-tax assessments and judgments by reason of the illegal and wrongful acts of administration, and violation of the duties and obligations inposed on her by said act of sale of June 7th, 1876, or any of them, or from any other cause, and that the sum found to be due on said accounting with interest, may be decreed to be paid to your orator and other parties similarly situated, to the full extent of their warrants with interest thereon, and that the amount of taxes assessed as aforesaid against the city of New Orleans on her streets, squares, and public places, be specially decreed to be a trust fund in the hands of said city, applicable to the payment of said warrants of your orator and such other holders, who may avail themselves of the benefit of these proceedings and offer to pay their share of costs, expenses, and counsel fees herein, and that said city of New Orleans be decreed estopped from setting up any defence of offset thereto or payment thereof by reason of the issuance of said bonds of said drainage series issued and delivered pursuant to said act No. 73 of the year 1872, and that your orator and said other parties similarly situated may have judgment against said city of New Orleans, for the amount of the drainage warrants respectively held by them, with interest and costs, and that he may have such other and further relief and redress as to right and justice may appertain and as the court is competent to give in the premises.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this hon. court directed to said city of New Orleans, on a day certain therein to be named, and under a certain penalty, to appear before this hon. court, then and there to answer all and singular the premises, and to stand to, perform and abide such order, direction and decree as may be meet

and agreeable to equity and good conscience, and your orator as in duty bound will ever pray.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainants.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
v.
CITY OF NEW ORLEANS. } No. 12350.

For amendment to the bill of complaint in the above-entitled cause, after the last word of the 14th clause insert the following:

Your orator further avers that the said warrants owned by him were presented to the then administrator of finance of the city of New Orleans for payment pursuant to law, on the 6th day of June, 1876, but there being no funds at the time to the credit of said Mississippi & Mexican Gulf Ship Canal Company available for the payment thereof said administrator indorsed upon each of said warrants the fact that they had been so presented; by reason whereof interest became due on said warrants from date of presentation until paid at the rate of eight per cent. per annum.

After the last word of the prayer of the bill insert the words, viz:

And your orator specially prays that the defendant in accounting for the taxes for which she is liable in the drainage fund, may be charged with interest thereon at the rate of six per cent. per annum from the date when the several assessments were homologated, and that your orator and other warrant-holders similarly situated may be allowed and decreed interest on the warrants held by them at the rate of eight per cent. per annum from June 6, 1876, until paid.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Sept. 4, '97, and on the 7th day of the same month and year I served a copy hereof on Branch K. Miller by handing the same to him in person in the city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
U. S. Marshal.
By JOHN EARLY,
Deputy U. S. Marshal.

Answer.

Filed Oct. 30, 1897.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350. In Equity.

The answer of the above-named defendant to the bill of complaint of the above-named plaintiff.

This defendant, saving and reserving to itself, now and at all times hereafter, any and all manner of benefit and advantage of exception, which can or may be had or taken to the complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in any way material or necessary for it to make answer unto, *it* answers and says:

That by the several acts, No. 165 of 1858, "to provide for leveeing, draining and reclaiming swamp lands in portions of the parishes of Orleans and Jefferson," No. 191 of 1859, supplementary to the first act, No. 57 of 1861, "to provide for collection of drainage assessments," etc., and No. 30 of 1871, "to provide for drainage," etc., the last-named act introducing the Mississippi & Mexican Gulf Ship Canal Company that undertook said drainage, the legislature devised a drainage system for the lands specified, all of which is more fully hereinafter set forth, and to said acts special reference is made for fuller explanation and greater certainty.

This defendant avers that the said several acts propounded a system of drainage for the city of New Orleans, the expense of which was to be borne by the owners of the lands drained, to be collected from them by assessments, and, as in all systems of special taxation for local improvements, the assessments were based upon the prospective benefits proposed by the drainage.

That by the earlier of these acts the appointment of commissioners was provided for, for whom the board of administrators of the city of New Orleans were afterwards substituted, by whom plans were to be prepared, exhibiting the lands to be drained, the names of the owners, and the probable cost of drainage; the plans were to be filed in designated courts, after due notice to the property-owners; the commissioners, and subsequently the administrators, were authorized to levy assessments on such lands for the drainage expenses; the assessment-rolls, like the plans, were to be filed in said courts, and while these assessments, levied in advance, for prospective drainage and benefit to the land, imported no liability if the drainage failed and was of no benefit to the lands, the acts provided that the homologation of the plans, though creating only such provisional liability, should subject the lands to a lien and privilege to secure the cost of drainage, and that the judgments homologating the assessment-rolls, though creating only such conditional liability, should be judgments

against the lands and the owners thereof, on which execution might issue.

This defendant, further answering, shows that the greater portion of these assessments were made at an early period after the acts of 1858, 1859 and 1861, and many years thereafter a corporation, known as the Mississippi & Mexican Gulf Ship Canal Company, professing to have the means to secure the drainage promised years before, succeeded in procuring the passage by the General Assembly of the State of Louisiana of said act No. 30 of 1871, by which it was authorized to build protection levees around the drainage districts, digging parallel and intersecting canals, properly connected, of the requisite depth, width and capacity, by which it was claimed that the water gathered within the levees could be conducted to a reservoir canal along the shores of Lake Pontchartrain, thence pumped into the lake by pumps and machinery to be furnished and operated by and at the expense of the city of New Orleans, or its board of administrators, and the said act, assuming the practicability of the scheme, not verified by the result, authorized an extension of the drainage districts; that the said act further substituted the board of administrators of the city of New Orleans for the commissioners constituted by the said prior acts, directed the transfer of the drainage tableaux, and office and other records to the said board of administrators, authorized them to levy and collect the assessments, and subrogated them to all the rights of the commissioners; that for the work of the company warrants were to be issued, as was provided by said act, payable, however, only from drainage taxes, and to bear 8% per annum until the taxes should be collected; and this defendant further shows, that the said plans and assessments, without warrant or authority of law, embraced public streets, parks, squares, and other public places or "public things," not subject to taxation or to assessments for local improvements, or to any form of taxation, and as to the assessments of private property, or property owned by private persons, made or to be made, based entirely on the anticipated or prospective consideration, they were resisted by the said owners of private property, on defenses, which were sustained by the courts, of the complete failure of the prospective and anticipated consideration, the commissioners and the company, and its assignee who succeeded it, having failed to accomplish the promised drainage, as will be more fully shown hereafter.

And this respondent, further answering, denies that the aforesaid assessments on public streets, parks, squares and other "public things," included in what is termed by the bill of complaint herein "balance due on assessments," are or were ever due and owing by this respondent, and also denies that the said act of 1871, or any other act, confirmed or made exigible such void assessments; and as to the said assessments against private property, or property owned by private persons, they were incapable of enforcement, by reason of the defenses applicable and pertinent to the same by the owners of said property, particularly by reason of the defense of the property-owners that the drainage scheme accomplished or effected no drainage, and conferred no benefit of any character whatsoever

upon the property, and save that the act of 1871 directed the collection of such assessments, this defendant denies that they, or what is termed by the bill of complaint the "balance" to be due on the assessments, were due, confirmed or made exigible, or could be made such, by said act, or any other act, owing to the failure of the entire system of drainage, on the successful accomplishment of which the assessments and their collection depended as a condition.

And further answering, this respondent shows and admits, that the said commissioners and the said board of administrators illegally including in said plans prepared and filed by them, said public streets, parks, squares and other public places, and illegally including in said assessment-rolls assessments on said "public things," and illegally extending the said assessments to what the bill terms the fourth drainage district, the law and certain ordinances purporting to create said district being unconstitutional, and null and void, and was so decided by the supreme court of the State of Louisiana in the succession of Patrick Irvin, 33d La. An. Rep., p. 63, prepared and filed the rolls, and made the assessments stated in the bill.

And further answering, this respondent avers, that no judgment of homologation or approval by any court, particularly such as are averred in the bill herein, could exceed, transcend or have any greater effect, than the authority contained in the said several acts, so as to permit or give validity to any assessments or taxes other than those made upon or against private property, or property owned by private persons, nor could they in any manner or to any extent give validity to any assessments made or taxes levied against public streets, parks, public squares, or other "public things," or to create even the color of a charge of liability against the city of New Orleans.

And further answering, this defendant says, that the said judgment- homologating such plans and rolls, do and can give no validity to such assessments on public streets, parks, squares and other "public things," nor do they bind or create any liability against the said owners of private property, if the proposed drainage was not successfully accomplished; and this defendant denies, that such judgments of homologation against the lands or owners, or any of the property therein mentioned save of the conditional character stated, now are, or ever were, judgments of any force or effect against such lands, property or owners, owing to the complete failure of the anticipated and prospective consideration, on which the assessments and homologations were based; and this defendant shows, that said judgments of homologation, of not the least validity in respect to the aforesaid assessments on public streets, parks, squares, or other "public things," were and are of no force, for the further reason that the drainage was never at any time accomplished.

Further answering, this defendant admits, that the assessments levied by the commissioners first, and later by the administrators, consisting of said illegal assessments of "public things," and of assessments against private property not capable of enforcement, as already set forth, were of the amounts stated in the bill, and this defendant again denies the aforesaid assessments, whether or not in-

cluded in the homologated rolls, incapable as they were of enforcement against private property, for the causes hereinbefore set forth, and utterly void so far as they bore or purported to bear on or against public streets, parks, squares or other "public things," were ever due or owing, or that there is or was at any time what the bill terms any "balance," or any part thereof, outstanding or in any manner due, or that of the said alleged "balance," there was a single dollar due by respondent on the said public streets, parks, squares, public places or other "public things," exempt from any assessments under the said statutes providing for the same.

And further answering, this defendant shows, that for at least five years after the enactment of the said statute of 1871, the said Mississippi & Mexican Gulf Ship Canal Company for part of the time, and Warner Van Norden, its assignee, for the other part thereof, claimed to have been engaged in the work of drainage they undertook; that the result of their enterprise demonstrated their plans to be fatally defective, and insufficient in every particular; and further answering, this defendant avers, that the canals claimed to have been dug by the said company and its assignee were not sufficient in number, width, depth or capacity, and from defective digging and excavation, improper connection, and other insufficiencies and defects, no water would flow into them, or reach the aforesaid reservoir canal, from which it was the company's plan the water was to be pumped into the lake, and that the levee work claimed to have been done by said company and its assignee was wholly insufficient to afford any protection from overflow, the protection levee in front, with which the said company and its assignee had nothing to do, providing the only protection from overflow, so that there was, respondent avers, on the part of the said company and its assignee, a complete failure of their undertaking to drain the lands, and neither was entitled to any consideration or should have received any warrants for the same, and whether or not the said plans had the indorsement and approval of engineers this defendant has no knowledge, but whether so indorsed and approved or not, failure was the result, and the said company and its assignee, charged with the execution of the said work, are solely responsible for its failure, this defendant having furnished pumps, labor, machinery and borne the expenses of operating the same, and having done everything required of it by the said act of 1871, and respondent denies that the plan or plans of the company was or were in any manner supplemented by this defendant, and defendant denies the allegation in the bill to the effect that the "plan was well devised, complete and sufficient," in any respect and that if carried out and completed, would have protected the lands from overflow, improved the drainage, and fitted the lands for agricultural, business, residence or any other purposes, but all such allegations in the bill and others to like effect are untrue.

And further answering, this defendant avers, that whether the said company and its assignee dug and deepened canals, as is alleged, and to the extent as is stated in the bill, or handled the yards of earth, or did levee work, as set up in the bill, this defendant has no knowledge, but charges that all the work, whatever it may have

been, claimed to have been done by said company or its assignee, was utterly defective, insufficient, and inadequate to secure any drainage of the lands as hereinbefore set forth, and respondent denies to be true the allegations in the bill to the effect that the work from 1871 or at any other time was prosecuted by the said company, or its assignee, or either, with "great vigor," or any vigor at all, and it denies that said work conformed in all or any respects to the requirements of the said statutes and the design of the said board of administrators, and that it was approved or accepted by them, and that the work was adequate or at all adapted to secure the proposed drainage; and this defendant further denies that it required only the completion of a gap at Lake Pontchartrain, and the placing in position of a pump, to complete the system; but each and all of said allegation-, and others to like effect, are untrue, and this defendant avers the fact to be that all of the work of the said company was badly executed, defective, and wholly unsuited for any drainage, and failed to accomplish any, as hereinbefore set forth, and this defendant again affirms.

And further answering, this defendant says, that in 1876, or by the beginning of that year, the work of drainage and levees which had theretofore been attempted by the said company and its said assignee having completely failed, the General Assembly of the State of Louisiana, by act No. 16 of that year, was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by this defendant of the dredge-boats, rights, franchises, and other property of the company, for a price in drainage warrants, delivered to Warner Van Norden, the said assignee, payable only from drainage taxes, and this act was followed by the said purchase from and surrender of the franchises by the said company and its assignee, as shown by the said legislative act and act of purchase, a copy of which is filed with the bill, to which reference is made.

And further answering, respondent shows, that there was no obligation imposed on respondent by the said act of 1871, or that of 1876, or in any manner by law, to the warrant-holders, or to the payment of warrants, or in any respect to said drainage warrants, save a proper diligence to collect the taxes out of which the same were payable, and apply the collections to their payment, and that this charge imposed by the said legislative act respondent fully performed, and hence there is no basis whatever to hold this respondent liable for assessments against private property or the owners of private property, or for the aforesaid illegal and void assessments on public streets, parks, squares, or other public places or "public things," or for the payment of the drainage warrants issued under the act of 1871 or 1876, or for any other act or conduct of this defendant, under said act of 1871, or that of 1876, or for any cause whatsoever.

And further answering, respondent states, that whether or not complainant is the holder, by assignment or otherwise, of the drainage warrants described in the bill, and issued to Van Norden, or is the transferree or assignee of any other of the pretended claims

alleged in the bill, or whether or not he was or is a citizen of the State of New York, this defendant has no knowledge, information or belief, but this defendant denies that the said Van Norden has or ever had any claim whatever against it, on or in respect to said warrants, or any of them, or arising from or out of the said act of 1876, or by reason of the non-completion of the drainage, or the non-collection of the drainage taxes, or in respect to any causes or things whatsoever.

And further answering, this defendant, save and except that the said act of the General Assembly of the State of Louisiana of 1876 directed that the drainage taxes collected be applied to pay the purchase warrants, as well as other warrants, denies that said act was any destination, new or otherwise, of drainage assessments, funds or taxes, as they then stood, to the payment of the purchase price of the dredge-boats and other property, or to the purchase warrants issued to Van Norden, or to any other warrants, or that the said act had the least purpose to give, or that it gave, the least validity to the aforesaid void assessments or taxes on public streets, parks, squares, public places or other "public things," and this defendant denies that a dollar of drainage taxes collected from private property has ever been diverted from drainage-warrant holders.

And further answering, respondent shows, that said act of 1876 neither intended, nor did it impose, any obligation whatsoever on this defendant to the holders of the drainage warrants issued to Van Norden, for the purchase of the said property and franchise, or in respect to drainage taxes and their collection, or to warrant-holders of any character whatsoever, save to account for collections as already stated.

And further answering, this defendant denies, that by the said act of 1876, or any of the stipulations therein contained, this defendant became the voluntary or contractual trustee for the collection of the taxes which the bill claims "to be then due," but which as a matter of fact and law were not due or owing in any sense.

And this respondent further denies, that previous to the said act of 1876, there was imposed on it the duties of trustee, for the collection and payment of drainage taxes for drainage warrants, or any duty whatever, in respect to said taxes, save to account for collections or assessments on private property, but this defendant alleges, that subsequent to said act of 1876, it applied and devoted itself with great diligence, and to the full extent of its ability, to the effort to improve and make serviceable the canals, levees, and other drainage work of the said company and its assigns, and to drain the lands; and this defendant, to aid in the collection of drainage taxes, established a bureau of traffic in the city hall, and the holders of the drainage warrants appointed an agent, who was placed in charge of the same, with the consent and authority of this respondent, to proceed with the collection of the drainage taxes, and who gave such instruction as he deemed judicious as to the collection of such taxes, which were always followed by the officials of this respondent, and besides, respondent did all in its power to prosecute the collection of the same; the services of the attorneys and executive officers of

this respondent in this behalf were directed at all times to such collections, and were also entirely at the service of and freely used by the said agent, whenever required, and that they were diligent in their efforts to make such collection; the drainage taxes were extended on the regular tax bills of this respondent, asserted and claimed on every account filed in the courts by administrators, executors, syndics, and persons exercising like authority; that a large proportion of the property assessed for taxes was remote from the inhabited limits of the city, in the swamp, and unavailable for the collection of said taxes, especially under execution, with the said drainage assessments for unaccomplished drainage recorded in the mortgage office; but notwithstanding a great number of executions were issued, whenever, in the judgment of the said agent or the officials of this respondent, they were deemed expedient; and by said modes and others collections were made, and all accounted for, and the wholly untenable proposition, of the bill, is in effect, that respondent is to be held as guarantor of the residue of assessments and taxes uncollected, which the combined efforts of the aforesaid agent and attorneys and other officials of the city of New Orleans, and the sheriffs of the parish of Orleans, were unable to collect, to a great extent not susceptible of being realized even if the work of drainage had been performed, and which the district courts, as well as the supreme court of the State of Louisiana held could not be enforced; that in May, 1882, the latter court, in the suit of Davidson *vs.* The City of New Orleans, 34th La. An., p. 170, the plaintiff therein being assessed for and contesting a large amount of drainage taxes, held that the same could not be collected or their payment enforced, because of the failure of the consideration of the assessments, namely, drainage not performed, and to that decision reported in 34th La. An., p. 170, special reference is made, and it is prayed to be taken as part of this answer; and this respondent utterly denies the allegations of the bill that said decision was because of or in any manner due to any failure or neglect of duty on the part of this respondent, in respect to drainage or drainage acts, or that there was any such failure or neglect or that the supreme court imputes to or intimates any such failure or neglect; but this respondent avers, that said decision was solely because of the complete failure of said company and Van Norden, assignee, to effect any drainage; and this respondent, again averring its utmost efforts, continued and persisted at all times, to make effective the drainage undertaken by the said company and its assignee, and to collect the assessments, shows, that the drainage, and the collections of the assessments therefor, failed, not from any act of omission or commission or conduct whatever of this defendant, but solely and only on account of the complete failure of the company and its assignee to accomplish the work of drainage and levees, which they undertook, and the other causes aforesaid, and the decisions of the courts hereinbefore mentioned, that there was no basis to demand their payment.

And further answering, this defendant shows, that all the allegations in the bill which charge respondent with any neglect of duty with regard to said work of drainage and its non-completion, and

impute negligence or carelessness of any kind in respect to the collection of the said drainage taxes, and particularly the allegations that undertake to charge respondent with the responsibility for the non-collection of drainage taxes, are wholly untrue and unfounded, and hence this defendant denies all and every allegation in the bill to the effect that by the act of 1876 the duty was cast upon it "to complete the drainage system or some other," and that after said purchase, "respondent had the power, machinery and outfit to complete the system, or adopt some other that would have drained the lands or made them available for the payment of purchase warrants or any other," and that respondent had "an unlimited and unexhausted power of taxation," or any power of taxation, "by which defendant could have obtained the money to have completed the drainage," and that "defendant abandoned all pretense of draining," or destroyed or impaired in any manner what is styled by the bill the "source" from which all the warrants were to be paid, but each and all of said allegations, and all others to like effect, are entirely unfounded, and the facts are that respondent, after the adoption of the said act of 1876, did all in its power, and all that could be reasonably expected of it, to drain the lands; that it had no power, nor was it under any obligation, to adopt any system of drainage or power of taxation for drainage purposes, the whole expense of which, under the law, was to be assessed exclusively on private property, that is, property owned by private persons, within the territory to be drained, and all taxation by this defendant being limited at all times by the constitution and laws of the State of Louisiana, and confined to municipal purposes other than and excluding all expense of drainage, and as to the assessments, at the time of the sale of the property and franchises, by Van Norden, while of the amount stated in the bill, they consisted, as herein already set forth, of the aforesaid illegal assessments on public streets, parks, squares, public places and other "public things," and of the aforesaid assessments against private property, or assessments against private persons, incapable of enforcement.

And this defendant denies the allegations to the effect that the drainage from its commencement, or at any time, had been prosecuted with vigor by complainant or its assignee, and "that respondent ceased work on the same," and "sold some of the boats and machinery," save some old, unsound, dilapidated and useless boats and material, admitted to have been sold, and that respondent "allowed others to rot and sink," and that "they were in first-class condition when received," and that "respondent allowed the canals to fill up and become clogged," the fact being, and this respondent so avers, that the canals were clogged and filled up from the defects in the digging and of the construction by said company and its assignee; and defendant further denies, that they were in any sense destroyed or in the least manner impaired by it, but on the contrary, this defendant avers, that it sought and proceeded in every way to improve the said work of drainage, defective and insufficient from its inception, attempted by the company and its assignee, and this defendant specially denies that it

destroyed or neglected "the plan of the company," and that it "incapacitated itself for drainage work," but all such allegations in the said bill, and others to like effect, denying defendant's diligence and other efforts to make serviceable the work of the company and its assignee, are wholly untrue; and further answering, defendant denies, that in the suit of The Park Commissioners *vs.* City of New Orleans, this defendant set up and claimed that it was entitled to an offset of drainage taxes against the demand urged in said suit, but that said taxes had been accounted for, and applied in the payment and redemption of drainage warrants, and were not "lost to the fund," as the bill charges; and this defendant denies that it ever claimed or appropriated a dollar of drainage taxes, and as to the allegation that when proceedings were brought against it to erase and cancel drainage taxes, that this defendant, with knowledge of the work and its value, never called witnesses to prove it, and that in the case of Girardey *vs.* The Heirs of Henry, that respondent, "with knowledge that the land was drained and of the benefit thereo," never called witnesses, etc., and "suffered the matter to go by default," this defendant shows that the matters in said allegations are untruly stated, and the facts are that there was no drainage or benefit to the lands involved in said proceedings and suit, and that the drainage taxes were by the court decreed to be cancelled, and the inscriptions erased, on the proof produced by the owners that there had been no drainage accomplished, and hence the taxes could not be collected, but not from any omission or negligence of this defendant; and defendant, further answering, shows, that if in some case, not particularized in the bill, steps were not taken to dissolve injunctions to restrain the execution of drainage judgments, it was, as this defendant believes and charges, because in view of the then pending litigation, contesting the said drainage taxes, in the opinion of the law officers and executive officials of this respondent of that period, executions and motions to dissolve only brought fresh litigation, barren of practical, beneficial or desirable result, in any particular; and this defendant, further answering, denies the allegations of the bill to the effect that since the aforesaid purchase, it has "done nothing to compel the collection and payment of the drainage taxes, and nothing towards the collection of said taxes, but to keep an office in the city hall, where the agent of Warner Van Norden sought to induce payment of drainage taxes," etc., and that "but one execution had been issued on drainage judgments since June, 1876," and "that this defendant by other means had destroyed," or in the least "impaired the drainage fund," but defendant avers, on the contrary, that it used the utmost diligence to collect said taxes, and respondent denies to be true in any respect or particular, that it has become or is accountable for any drainage taxes collected, every dollar whereof ever collected having been fully accounted for and applied in accordance with law, or that any of said taxes have been misapplied, or that a dollar of said taxes has not been collected that could have been collected, or that a dollar has been wasted or lost, or misapplied, by the non-fulfillment of any duty by respondent, between June, 1871, and June, 1891, or between the date of the sale

by said company to Van Norden, June, 1871, or at any other time or periods, but respondent avers that its whole duty in the premises has been fully performed, particularly as hereinbefore alleged and again affirmed.

And further answering, respondent shows that in the year 1877, no drainage having been accomplished by the said company or its assignee, under assessments for the greater part made at least twenty years before, and in all that time clouding property against which they were assessed, and preventing its sale or improvement, the General Assembly enacted the statutes of that year, mentioned and referred to in the bill, by which certain lands were excluded from the drainage districts defined in earlier acts, and directing that no drainage taxes should be collected on any of the lands until there had been conferred and received by the same such improvement, by canals, levees and draining, as would effect drainage equal in value to the said assessments, and directing the erasure of drainage inscriptions, but respondent shows that for years after the adoption of the said statutes it used the utmost efforts to drain the said lands and collect the said assessments, and respondent admits that in May, 1881, in response to complaints of the property-owners against assessments for drainage never accomplished by said company or its assignee, the common council of defendant thought proper to instruct the mayor to issue his proclamation, advising the property-owners of their rights, as declared by the supreme court of the State of Louisiana shortly afterwards; and this defendant shows and admits that this decision of the highest court of the State of Louisiana was followed by the public notice and proclamation directed by the council, substantially to the effect of that decision, that the collection of drainage taxes could not be enforced; but respondent denies the allegation to the effect that after "this period of supineness and inactivity," referring to the collection of drainage taxes, the proclamation was directed, there having been, as this respondent avers, no such supineness or inactivity, at any time, on its part; and respondent equally denies the allegation and in the sense intended by the bill, "that said proclamation advised the non-payment of taxes," but avers that the proclamation announced the understanding by the council of the legal rights of the property-owners, as declared by the courts; and respondent also denies that the said council directed the other publication referred to in the bill, "in the prosecution of any purpose to destroy the drainage taxes and dissuade their payment, and to point out how the payment of drainage taxes might be avoided," save that the proclamation announced the relief to which the property-owners were entitled under the decision, and this defendant admits that large amounts of drainage taxes have been cancelled and erased under this decision, and that it has become the jurisprudence of the State, but this defendant denies that said taxes have been lost "in consequence of the suggestion or proclamation" put forth by defendant, but that said erasures and cancellations have been solely because, under the decisions of the courts, the collection of the drainage taxes could not be enforced.

Whether the acts of the General Assembly of the State of Louisiana

of 1877 and 1882 on the subject are unconstitutional or illegal, or violative of article 1, section 10, of the Constitution of the United States, or are simply declaratory of legal rights as a legal proposition, this defendant submits to the court, and as to the allegation in the bill importing that this defendant used the act of 1877 as a pretence to cease or omit in any degree the efforts to drain said lands, and to collect the said drainage taxes, and "at other times pretended the lands were not worth the taxes," the same are untrue, but the facts are, that after, as before, the said acts, defendant's efforts to effect the said drainage and collect the taxes were persistent and continued, and though in fact a large portion of the lands seized for taxes were unsalable, as already stated, the fact was never suggested by defendant in any manner in connection with the collection of the said drainage taxes or work of drainage, and had not the least influence to diminish, nor did it diminish in any degree the efforts of this defendant to drain the said lands and collect the said taxes.

And further answering, this defendant shows that never liable for the so-called purchase warrants, payable only from drainage assessments, based on the prospective consideration of drainage, and the corresponding benefit, never fulfilled, and having used its best efforts to make effective the said drainage plan, and attempted execution thereof by the company and its assignee, not susceptible of being made serviceable for drainage, owing solely to the defective plan and entirely imperfect and insufficient work of the said company and its said assignee, and this defendant having used its utmost effort to collect said drainage assessment on private property, and not liable for the said assessments on public streets, parks, squares, public places and other "public things," not only because the drainage was never performed, but because the said assessments were utterly illegal and void, as hereinbefore set forth, this defendant shows that there is not the slightest basis to hold it liable to complainant, or other holders of drainage warrants issued to Warner Van Norden, for the purchase of the said franchise, dredge-boats and other property, or for any cause whatsoever, nor is there the least basis to hold that under the aforesaid act of 1876, or any other act, or for any cause whatever, the said purchase warrants have any claim to payment from or on account of said void assessment on public streets, parks, squares, public places and other "public things," nor is there any foundation whatever for the pretenses of the bill asserting the liability of this defendant for the warrants of 1871, or any other drainage warrants, payable only from drainage taxes that could be collected on assessments against private property, and on or in respect to which there is not and never was any liability whatever of this defendant, as hereinbefore alleged and again affirmed.

Further answering, this respondent shows that under the act No. 73 of 1872, this respondent issued $1,672,105.21 of the bonds of this city, since paid or funded into its bonded debt, to take up drainage warrants issued under act No. 30 of 1871, all of which bonds were used, and applied at various dates, between the 10th of May, 1872,

and 31st of December, 1874, by exchanges for and redemption of said drainage warrants, to the full amount of $1,501,494.39 of said drainage warrants, the bonds having been issued in said exchanges at the rate of 90c. on the dollar, as directed by said act of 1872; and a statement of said bonds issued, and of warrants exchanged, with the ordinance of the council relating thereto, is herewith filed and made part hereof, and to which, as well as said acts, special reference is made, for fuller explanation and greater certainty, and now this respondent charges and avers that if said assessments on streets, squares and public places ever produced any liability on the part of respondent, again denied, then said bond issue and application thereof in the redemption of $1,501,494.39 of drainage warrants, far in excess of said assessments, must be deemed in law and equity to operate a full discharge of said liability, as adjudged by the Supreme Court of the United States, in the suit of Peake *vs.* The City of New Orleans, to which fuller reference is hereinafter made, and accordingly said discharge, if liability ever existed, this respondent in addition to all other defenses, now avers and sets up as a defense against and in bar of the complainant's bill, and of all the demands therein, and of all the relief thereby sought, and the full benefit of said discharge is insisted upon in this answer; and this respondent further shows that at and prior to the adoption of the act of 1876, and the purchase from Van Norden under it, the issue and application of the bonds aforesaid in the redemption of the drainage warrants, and the discharge thereby effected of all liability of respondent, if any ever existed, for the aforesaid illegal assessments of streets, squares and public places, was fully known to all drainage-warrant holders, and especially to Van Norden himself; that he or his assignees or pledgees were the holders of a very large amount of the drainage warrants redeemed by said bonds, and respondent believes and charges that the act of 1872 was passed mainly at the instance and for the benefit of said Van Norden, and neither he nor any holder of drainage warrants can pretend or urge that the city of New Orleans is now to be called on to pay void assessments, when if the liability ever existed, again denied, it was more than satisfied by the aforesaid bond issue sought by Van Norden, and of which he and the other warrant-holders had the full benefit.

And further answering, respondent charges that fully apprised of said bond issue and said discharge the result thereof, neither the said Van Norden or any drainage warrant-holder can now urge that this respondent did not assert said discharge, known in its full scope and effect at all times to said Van Norden, and never controverted by him or any warrant-holder, until the utterly unfounded pretension was advanced in the previous suit of complainant, met promptly by the defense of said discharge, sustained by the decision of the Supreme Court of the United States; and respondent utterly denies that it ever acted upon or intimated that the said bonds were issued for any liability cast on respondent by the act of 1872, for there was no such liability; and respondent equally denies the allegation that the said legislative act of 1876 was in any line or word any recognition of the so-called "drainage fund" as it then stood on the records

of the city or of the mortgage office, and "had not been discharged in any manner," etc., but respondent avers that the whole purpose and effect of said act was to require the application of collections of drainage assessments on private property to the payment of drainage warrants, and the act left the said discharge in full force and virtue; and as to the allegations in the bill to the effect that the discharge was not claimed, this respondent, reiterating the allegations in this answer on that point, avers and charges, that Van Norden, well knowing of said discharge, also knew that if he or any other warrant-holder ever undertook to set up the pretensions of this bill in respect to said void assessments, that respondent, with no reason to anticipate such unfounded demand, would repel it, and insist and maintain that said bond issue had completely discharged the asserted liability, or pretended obligation to apply the said assessments on streets, squares and public places, described in the bill as due by respondent, but never due, to the payment of said warrants issued to Van Norden, or to any other warrants; and respondent again denies, that said act of purchase, or any covenant therein, recognized in any manner the existence of any drainage taxes as applicable to the payment of any warrants, but the purpose and effect of said act was as this respondent has set forth, and not otherwise, and the stipulation in said act "not to impede, but to facilitate, the collection of drainage taxes," etc., to which the bill makes reference, refers to drainage assessments on private property, with which respondent has fully complied.

And further answering, respondent utterly denies the allegations that "Van Norden, who was ignorant respondent would claim said discharge, could have entered into said purchase if advised that such claim would be made," etc., and on the contrary, respondent avers that both he and the company, utterly insolvent, unable to continue the attempted drainage, the property professedly sold by him to respondent having been subjected to sale under execution for the company's debts, and the sale to him adjudged fraudulent, as appears by the decision of the supreme court of the State in the suit of Marchand *vs.* Van Norden, 23rd An., p. 803, that under such circumstances Van Norden was eager to sell to respondent for a price far in excess of the value of the property, and take his chance of payment from assessments on private property, and this respondent avers that the pretension now advanced of respondent's asserted liability for said void assessments is an afterthought, without merit or foundation of any kind.

Respondent further charges that all of the dredge-boats and other property sold to it by Van Norden were of little or no value, or in any event, of a value infinitesimal as compared with the price paid for the same, and that the sale thereof for the price stipulated as to such property was a fraud upon this defendant and its tax-payers.

And further answering, respondent shows that all the drainage taxes ever collected have been faithfully applied as the law directs, and the allegations in the bill that the taxes collected at the office in the city hall, or at any other place or time have not been accounted for, are denied; that if this defendant ever was a debtor for drain-

age taxes, which is denied, the aforesaid issue of bonds for the redemption of drainage warrants far exceeded any liability, if any there was, of this defendant, for collections, and at all times since said issue, on an adjustment of accounts, the said bond issue shows, and the fact is, that any and all liability for the taxes collected, if any ever existed, which is again denied, has been more than discharged by said bond issue more than sufficient besides to cover the aforesaid assessments on public streets, parks, squares, public places and other "public things," if said assessment ever produced any liability, which is again denied.

This defendant further shows, that in the suit of —— —— *vs.* —— ——, No. — of the docket of this court, this defendant was ordered and rendered an account of all drainage taxes, and defendant submits that there is no reason to renew the call or order for such account.

And respondent further charges that by the amendment to the constitution of the State of Louisiana, proposed by the General Assembly thereof in 1874, and which was subsequently adopted and went into effect from the first of January, 1875, the city of New Orleans was thereafter prohibited from increasing her debt in any manner, or from issuing any evidence of debt, or warrant for the payment of money, except against cash in the treasury, the said amendments providing that it should not prevent the issue of drainage warrants to the said Van Norden, transferree of the said company, under act 30 of 1871, but payable only from drainage taxes, to which amendment, found on page 56 of the Acts of the General Assembly of the State of Louisiana of 1874, special reference is made, and prayed to be taken as part hereof; and respondent shows, that drainage warrants, by the law of their creation, payable only from drainage taxes, never after that amendment could become part of respondent's debt, nor could any omission of duty on the part of respondent, in respect to drainage or the collection of taxes, if any, which is again denied, or any act or conduct of respondent, or any act of the General Assembly, or purchase of property under such act, bind or obligate respondent, after such amendment, for the payment of any such drainage warrants, or for the purchase price of said property, or for any drainage warrants issued for such price, or for any debt or liability whatever in respect to drainage, nor did the said act of 1876, or contract of purchase, attempt to impose on this respondent any such prohibited liability, but in accordance with the said constitutional amendment, the price of the property directed by said act to be purchased could be paid only from assessments on private property, and, accordingly, the act and contract of purchase expressly stipulated that such price was payable from drainage taxes alone; and further answering, this defendant shows, that if, as respondent maintains, the aforesaid bond issue and application thereof must be deemed to operate as a complete discharge of all liability of this respondent, for the aforesaid assessments on public streets, parks, squares, public places and other "public things," if prior to said bond issue any such liability could be deemed to exist, which is again denied, then, in view of said amount, far in excess of the

said assessments, furnished by this defendant, and applied by the drainage-warrant holders to pay their warrants, neither the act of 1876, nor the contract of purchase under it, could bind this defendant to pay one dollar of said assessments, or for the payment of any warrants, purchase or otherwise, from and out of said assessments and thus create a debt in violation of said constitutional amendment, by reviving the asserted liability, which, if it ever existed, had been more than satisfied at and prior to the adoption of the said act of 1876; and respondent further shows that in the suit heretofore brought by said drainage-warrant holders, it had been adjudged by the United States circuit court that by reason of said constitutional amendment, as well as other defences, that save an accounting for taxes collected, said warrant-holders had no claim whatever against this respondent, and to said suits and decrees therein special reference is made, namely:

And further answering, this respondent shows that heretofore it was sought to be made liable to the holders of the drainage warrants, under the aforesaid legislative acts of 1871 and 1876, and that all the grounds then available to the warrant-holders, are, in respect to the defense of *res adjudicata*, by law deemed to be, and as a matter of fact are, included in that previous suit, and were the same as those on which respondent is sought to be held in this case, and the grounds of defense in that suit are in substance and effect the same as those urged in this present suit; that the relief sought in this suit is the same as that claimed in the previous suit, and the bill in that, as in this suit, was filed for and in behalf of all warrant-holders; that the question in this suit was certified when the case stood on the demurrer to the bill, to the Supreme Court of the United States, and the answer of the Supreme Court, it is submitted, should not affect or prejudice respondent in its defense in this answer and on the testimony to be adduced, or to impair the defense of *res adjudicata* nor urged, and respondent shows, under the full testimony adduced, and the argument in the Supreme Court of the United States in the previous case, there was rendered a final decree on the merits, affirming that of the circuit court, and adjudged against the complainant in that suit, and in favor of respondent, the court holding and deciding that the holders of drainage warrants had no right or claim against respondent in respect to the matters and things there alleged, and dismissed said bill, with no right to file another; all of which appears in the suit of said J. W. Peake *vs.* The City of New Orleans, No. 11614 of the docket of this court, and the final decree of the Supreme Cour therein, found in 139 U. S. Reports, p. 342, to which special reference is made, and is prayed to be taken as part of this answer; and this defendant, entitled to include in this anwer the defense based on said decision, now sets up and avers said *res adjudicata*, in bar of and against complainant's bill, and all demands therein, and of all relief thereby sought, and the full benefit of said defense of *res adjudicata* of which defendant could avail by the plea of said defense in bar of the bill is prayed for, claimed and insisted upon in this answer.

And further answering, this defendant shows, that the demands of the drainage-warrant holders, set up in the bill, have had full

consideration in the courts, and have been fully pronounced without merit, and that the bill is an attempt to renew litigation upon some pretense of newly discovered grounds, substantially covered by past litigation and decrees, and in equity and law this litgation should be considered ended by the aforesaid peremptory exception or *res judicata*, as well as because of the prescription of five years, and respondent shows, that by the law of Louisiana, all suits and actions on promissory notes payable to order or bearer, and on all effects transferable of negotiable by indorsement or delivery and all promissory notes negotiable or otherwise, are prescribed by five years from maturity, and the prescription runs against all, as appears by the articles 3540 and 3541 of the Civil Code, to which special reference is made for fuller explanation and greater certainty; and respondent shows, that the drainage warrants, and this suit thereon, are within the scope of the said law of prescription, and said prescription of five years, in addition to all the other defenses herein urged and again affirmed and insisted upon, this defendant now avers and sets up as a defense, in bar of and against complainant's bill, and of all demands therein, and of all relief thereby sought, and the full benefit of said defense of prescription, could avail by the plea of said defense in bar of the bill, is prayed for, claimed and insisted upon by this answer.

And further answering, this respondent says, that any suit against it based upon any and all matters and things set out in the bill, cannot be maintained against it, for the reason that the same, and the liability sought to be established by the bill, is under the law of Louisiana barred by the prescription of ten years, established by articles 3544 and 3547 of the Revised Civil Code, to which special reference is made, for greater certainty, the same as though set out at length herein, and in addition to all of the other defenses herein urged, and again affirmed and insisted upon, this defendant now avers and sets up as a defense, in bar of and against complainant's bill, and any and all demands therein, of grounds upon which the same may be made, and of all relief sought, the said prescription of ten years; and this defendant claims all the benefit and defence of prescription could avail by the plea of the same in bar of the bill, the same said benefit being now prayed for, claimed and insisted by this answer.

And this defendant denies all and singular — and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged, without this, that there is no other matter, charged, or thing in the said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, traversed, avoided, and denied, is true to the knowledge and belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove, *if* this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges, in this behalf most wrongfully sustained.

(Signed) BRANCH K. MILLER,
SAM'L L. GILMORE,
City Att'y, Solicitors.

STATE OF LOUISIANA, }
Parish of Orleans. }

Personally appeared Walter C. Flower, who being duly sworn, deposes and says, that he is the mayor of The City of New Orleans, the defendant named above; that as much of the foregoing answer as concerns the acts or doings or omissions of the said defendant, is true to the best of his knowledge, and so much thereof as concerns the acts or doings of other persons he believes to be true.

(Signed) W. C. FLOWER, *Mayor.*

Sworn to and subscribed before me this 29th day of October, 1897.

[SEAL.] (Signed) P. ALPH. RABOUIN, *Not. Pub.*

"*Transfer* 1."

Mexican Gulf Ship Canal Co. and W. Van Norden, transferee, to the city of New Orleans.

Filed with and made part of bill Nov. 26, 1894.

N. O., 7th June, 1876. Sale of franchises. No. —. Mis. & Mex. Gulf Ship Canal Co. and W. Van Norden, transferee and individually, to the city of New Orleans.

UNITED STATES OF AMERICA, }
State of Louisiana, Parish of Orleans, City of New Orleans. }

Be it known, that on this seventh day of the month of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundredth, before me, Gustave Le Gardeur, Jr., a notary public, duly commissioned and sworn, in and for the city and parish aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared:

1. The Honorable Charles J. Leeds, mayor of the city of New Orleans, and herein duly authorized as such, under, and by virtue of ordinances Nos. 3479 and 3539, administration series, adopted by the council of the city of New Orleans, respectively, on the 25th day of April and 23d day of May, 1876, and herein furthermore fully authorized under and by virtue of the provisions of act No. 16 of acts of 1876, approved February 24, 1876.

2. Messrs. John Mathers, Jr., and Samuel D. Moody, both of this city, and herein acting, the former as president, and the latter as secretary, of the Mississippi & Mexican Gulf Ship Canal Company, a duly authorized corporate body of this State, domiciled in this city, and herein acting in their said capacities, under and by virtue of a resolution of the board of directors of the said Mississippi & Mexican Gulf — Canal Company, adopted at their sitting of the 3d day of June, 1876, a duly certified copy of which said resolution is hereto annexed for reference.

3. And Warner Van Norden, Esquire, also of this city, herein acting in his own name, individually, and also as transferee and

pledgee of the said Mississippi & Mexican Gulf Ship Canal Company, under and by virtue of an act passed before Andrew Hero, Jr., a notary public, in this city, on the 22d day of May, 1872.

And the said Mississippi and Mexican Gulf Ship Canal Co. through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee of the said company, by virtue of the aforerecited act of the 22d of May, 1872, before the said A. Hero, Jr., notary, declared that for the consideration and on the terms and conditions herein set forth, they do, by these presents, grant, bargain, sell, convey, transfer, assign and set over, with a full guarantee against all trouble, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for, and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, duly certified copies whereof are hereunto annexed for reference, and also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof.

All and singular, the rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of every nature and kind whatsoever which the said Mississippi and Mexican Gulf Ship Canal Company, has, or may have, under and by virtue of act No. 30 of the legislature of this State, entitled "An act to provide for the drainage of New Orleans," passed at the session of 1871, and of all other acts of the legislature of this State, and which the said W. Van Norden, as transferee and pledgee aforesaid, has, or may have, under and by virtue of the aforesaid act, passed on the 22d day of May, 1872, before the said Andrew Hero, Jr., notary.

And the said W. Van Norden, in his own name, individually declared that for the consideration and on the terms and conditions hereinafter set forth, he does by these presents grant, bargain, sell, convey, transfer, assign and set over, with a full guarantee against all trouble, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, and also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof.

All and singular the following-described dredge-boats and derricks, together with the machinery, engine, tackle, apparel and appurtenances, and all other necessaries thereto belonging, together with the hereinafter-mentioned articles and effects, to wit:

Dredge-boat No. 1, 70 feet long and 30 feet wide.
Dredge-boat No. 2, 70 feet long and 30 feet wide.
Dredge-boat No. 3, 70 feet long and 30 feet wide.
Dredge-boat No. 4, 70 feet long and 30 feet wide.

Dredge-boat, styled the J. O. Noyes, 62 feet long and 19 feet wide.

Dredge-boat, styled Clam Shall dredge, 65 feet long and 30 feet wide.

Dredge-boat known as Ridge boat, 83 feet long and 30 feet wide.

Four derricks, accompanying respectively dredge-boats Nos. 1, 2, 3 and 4.

One steamtug, known as the Olive.

One barge of far-floating derricks.

One floating boarding-house.

One lot of buildings at Halfway house.

One lot of large and small castings, including one heavy cast-iron mainmast, two heavy cast-iron topmasts, hoisting and surging drums, duplicate cog wheels and various small castings, etc., the whole more fully set forth in a detailed inventory on file in the office of the city surveyor.

The said Warner Van Norden, in his own name, individually, is the owner of the above-described dredge-boats, derricks and other effects and articles for having acquired the same by purchase from the said Mississippi and Mexican Gulf Ship Canal Company by act passed before the said A. Hero, notary, on the 22d day of November, 1872.

To have and to hold the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of the said Mississippi and Mexican Gulf Ship Canal Company and of the said W. Van Norden, as transferee and pledgee aforesaid, and the said dredge-boats, derricks and other articles and effects above described, unto the said city of New Orleans forever, by virtue of these presents.

And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee aforesaid, and — his own name individually, declare that they, moreover, and by these presents, subrogate the said city of New Orleans, in and to all and singular the rights, actions and remedies to which they are or may be entitled under and by virtue of the aforesaid act No. 30 of 1871, or of all other acts of the legislature of this State, and under and by virtue of the afore-recited acts passed before the said Andrew Hero, Jr., notary, respectively, and on the 22d day of May and 22d day of November, 1872, hereby authorize the said city of New Orleans to exercise and enjoy the said rights, actions and remedies in the same manner and to the same extent as it, the said Mississippi and Mexican Gulf Ship Canal Company, and he, the said W. Van Norden, as transferee and pledgee and in his own name, individually, might or could have done.

The sale of the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages by the said Mississippi and Mexican Gulf Ship Canal Company, and the said W. Van Norden, as transferee and pledgee aforesaid, and the sale of the said dredge-boats, derricks and other articles and effects by the said W. Van Norden, in his own name, individually, are made and accepted

for and in consideration of the price and sum of three hundred thousand ($300,000) dollars, payable in drainage warrants.

And now the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, declared that they have covenanted and agreed, and do, by these presents, covenant and agree, that the said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden, in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the said Mississippi and Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, ever had, or have now, or may have against the said city of New Orleans. And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, does, moreover, by these presents, fully authorize the said city of New Orleans to pay the said sum of three hundred thousand dollars, in drainage warrants, to the said Warner Van Norden.

And now, to these presents, personally came and appeared the Honorable John G. Brown, administrator of accounts of the city of New Orleans, who, by virtue of the authority in him vested by said ordinance No. 3539, administration series, and of the rights and powers conferred by said act No. 16, of acts of 1876, and with the consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company, has presently in the presence of the notary and witnesses undersigned, handed over and delivered the said sum of three hundred thousand dollars ($300,000) in drainage warrants to the said Warner Van Norden, who as transferee and pledgee aforesaid, and in his own name, individually, and with the full and entire consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company hereby acknowledging receipt of the same.

And for the purpose of providing for the payment of the warrants issued under and by virtue of these presents, and of all other drainage warrants heretofore issued and outstanding, the said city of New Orleans, through its mayor aforesaid, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, do, by these presents, covenant and agree that the existing rights and powers of the holders of drainage warrants, under the civil acts of the legislature of this State relative to drainage and drainage assessments, shall remain unimpaired, and that the drainage tax and assessment shall be administered, collected and paid in the manner and under the terms and conditions following, to wit:

The bureau of drainage collections shall be organized in an office at the city, as follows, to wit:

A book-keeper, who shall be appointed by the city council, and who shall keep such books and records, make such reports, and perform such duties as may be required by the administrators of finance and accounts. His salary shall not exceed two hundred dollars per month. Said officer shall not in any manner obstruct or delay the business of the office. He shall be removable by the council, upon the complaint of the collector, hereinafter provided for, for cause.

If desired by the said W. Van Norden, a duplicate set of books shall be made and placed subject to the use of the said collector.

Until the drainage warrants issue- by virtue of these presents, in conformity with said ordinance No. 3529, administration series, and all other drainage warrants, heretofore issued and now outstanding, shall be liquidated and paid, the collection of drainage assessments, shall be assigned to an officer, who shall be selected by the said W. Van Norden, and be confirmed by the city council. Said officer shall give bond with a good and solvent security in the sum of twenty-five thousand ($25,000) dollars for the prompt and faithful execution of the duties and powers provided by law for the collection of drainage assessments and the prompt and efficient collection of the same in accordance with law; and the business of his office shall be subject to the supervision of the administrators of finance and accounts. He shall receive a compensation in lieu of expenses of all kinds, including books, bills, stationery, legal services, costs of court or clerk's hire of three hundred ($300) dollars per month and 2½ per cent. commission on collection of drainage assessments, and shall make such monthly reports as may be required by the administrators of finance and accounts. Said collector shall be continued in office until the liquidation of the said drainage warrants issued by virtue of these presents or heretofore issued and now outstanding; and in case of death or resignation a successor shall be chosen as above provided for.

No receipt of the said collector for drainage assessment shall be valid unless contersigned by the administrator of finance.

The city council shall have the right to remove the said collector for good and sufficient cause, and a successor shall be appointed as hereinabove provided.

All expenses, fees and charges incurred in the collection of drainage assessment shall be paid out of the drainage fund.

All suits and judicial process and writs relating to — appertaining to drainage assessments and taxes shall be and continue as heretofore controlled by the city council, and be conducted by the city attorney, but all writs of "*fieri facias*" to be issued as required by law and the judgments of the courts.

All parties owing drainage assessments shall have the right to pay the same in drainage warrants, at their face value and interest thereon, and the said collector and administrators of finance shall receive the same in satisfaction of all drainage assessments.

All parties owing drainage assessments in the fourth drainage district shall be entitled, upon the prompt payment of the four-tenths of the whole assessments, to an extension of time for the payment

of the remaining six instalments; the said six instalments shall be paid yearly as prescribed by an ordinance already adopted by the city council.

And now the said Chas. J. Leeds, hereby promises for and binds and obligates the city of New Orleans, after the date of these presents, to issue no drainage warrants other than those issued by virtue of these presents, in conformity with said ordinance No. 3539, administration series, and such other drainage warrants as may now be issued and outstanding until said warrants have been fully liquidated and paid, and not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by and between the said parties hereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever until the full and final payment of the same; and it is moreover well understood and agreed by and between the said parties hereto, that all work heretofore done by said Wm. Van Norden, not certified shall be measured by the city surveyor, and the same shall be paid for in drainage warrants in the usual form, and that inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issued to the said W. Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same.

And now by virtue of the foregoing, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden as transferee and pledgee aforesaid, and in his own name, individually, declared that they do, by these presents, remise, release and forever discharge the said city of New Orleans from and against any and all claims and demands of every nature and kind whatsoever which they ever had or have now or may have against the said city of New Orleans.

And now it is moreover well understood, covenanted and agreed that the said Mississippi and Mexican Gulf Ship Canal Company and the said Warner Van Norden, individually, and as transferee and pledgee aforesaid, shall and will, at all times, protect the said city of New Orleans, against and save it harmless from any and all claims and demands of every nature and kind whatsoever which may have been, can now be or may hereafter be set up against the said city of New Orleans, or against them or either of them in reference to drainage work, arising out of their connection with the drainage of the city, or in any manner pertaining or relating to their acts, rights, franchises and privileges under said act No. 30 of 1871, or in reference to the said dredge-boats, derricks and other articles and effects, provided, however, that the guarantee herein set forth shall not be considered as extending any further than to warrant the city of New Orleans in the title to the boats and property herein transferred to it by said W. Van Norden, and to save

and indemnify the said city of New Orleans from any loss, injury or damage arising from the acts and conduct of the said Mississippi and Mexican Gulf Ship Canal Company or the said Warner Van Norden in reference to, or arising from their connection with the drainage work herein referred to.

Thus done and passed in New Orleans, at my office, the day, month and year first above written, in the presence of Armand Pitot, Jr., and Gustave M. Letellier, competent witnesses, who have signed these presents with the said parties and me, notary, after reading the whole.

(Original signed)

CHAS. J. LEEDS, *Mayor.*
J. MATHERS, *President.*
S. D. MOODY, *Secretary.*
J. G. BROWN,
Adm'r Pub. Acc't.
W. VAN NORDEN.
A. PITOT, JR.
G. M. LETELLIER.
G. LE GARDEUR, *Not. Pub.*

Registered in Conveyance Book 108, folio 484.
New Orleans, June 7, 1876.
[SEAL.] (Signed) C. B. FISH, *Registrar.*

A true copy of the original on and of record in my office.
New Orleans, June 9, 1876.

G. LE GARDEUR, *Not. Pub.*

Ordinance No. 3479, *A. S., for Appraisement of Property.*

Filed with and made part of bill Nov. 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April* 26, 1876.

(No. 3479, administration series.)

Be it ordained, That in accordance with the provisions of act No. 16, approved February 24, 1876, Thomas S. Hardee, city surveyor, be and he is hereby authorized and instructed to make a thorough examination of the condition and value of all the dredge-boats, machinery, tools and appurtenances belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavating of canals or building protection levees, making a report to the committee of the whole, together with a statement of all information in the possession of his office, concerning damages claimed by the said Mississippi and Mexican Gulf Ship Canal Company, or transferee thereof.

Adopted by the council of the city of New Orleans, April 25, 1876.

CHARLES J. LEEDS, *Mayor.*

Ordinance No. 3539, A. S.

Filed with and made part of bill November 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 26, 1876.

(No. 3539, administration series.)

Be it ordained, That the mayor be and he is hereby authorized and instructed to enter into notarial agreement with the Mississippi and Mexican Gulf Ship Canal Company, or transferee, for the purchase of all dredge-boats, derricks, parts of machinery and property of every description belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavation of drainage canals or construction of protection levees, as per inventory of the city surveyor, also for the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer to the city of New Orleans of all rights, privileges and franchises created, authorized or arising in favor of the Mississippi and Mexican Gulf Ship Canal Company and transferee, under and by virtue of act No. 30 of 1871, or under and by virtue of all other acts of the legislature of the State of Louisiana, or ordinances of the city of New Orleans, and embodying the terms agreed upon between W. Van Norden and the committee of the whole.

Be it ordained, That upon the execution of the aforesaid notarial agreement, the administrator of accounts be, and he is hereby authorized and directed to warrant upon the administrator of finance for the sum of $300,000, in drainage warrants, in full settlement, as above provided.

Adopted by the council of the city of New Orleans, May 23, 1876.

Yeas—Bertoli, Brown, Bouny, Burke, Landry, McCarthy, Pilsbury.

CHARLES J. LEEDS, *Mayor.*

"*Inventory* 1."

Copy of the inventory of the effects of the Miss. & Mexican Gulf Ship Canal Co. transferred to the city of New Orleans, as on file in the office of the city surveyor. Filed with and made part of bill Nov. 26, 1894.

CITY SURVEYOR'S OFFICE,
ROOM 19, CITY HALL, *May* 1, 1876.

To the hon. mayor and administrators of the city of New Orleans:

In conformity with instructions conveyed in an ordinance recently adopted by the city council, I have made a careful and thorough examination of the property mentioned and represented by W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, and herewith have the honor to submit a report showing the condition and approximate value of the same, together with such other information as I have been directed to

furnish under the requirements of said ordinance. The property examined consists of:

7 dredge-boats.
11 derricks.
1 steamtug.
1 barge for floating derricks.
1 floating boarding-house.
1 lot of buildings at Halfway house.
1 assortment of large and small castings, etc., for dredge-boat machinery.

Dredge-boat No. 1.

Dredge-boat No. 1 is now lying in Upper Line protection levee canal, near Carrollton, and has not been provided with work for over five months.

It is 70 feet long and 30 feet wide. The capacity of dipper is 1¼ cubic yards at each lift, and the average capacity for excavating per month is 12,500 cubic yards. The hull is six years old, and shows a little leakiness near foot of iron mast, but is still in serviceable condition, and the engine, boiler and other machinery is in good working order. The boat has an upper deck, with serviceable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order.

The machinery of the derrick accompanying this boat is now stored upon the deck of the dredge, the frame having rotted and been abandoned.

The machinery, however, is in good order and would be ready for service as soon as a new frame could be constructed. The original cost of the dredge was $25,000, and the derrick $5,000.

Dredge-boat No. 3.

Dredge-boat is now actively at work in excavating the Lower Line protection levee canal at a point about one mile south and east of its intersection with the Mobile railroad. It is 70 ft. in length and 30 ft. in width. The capacity of dipper is 1¼ cubic yards to the lift and the average capacity for excavating is about 12,500 cubic yards per month. The hull is six years old, with but slight apparent leaks, and has been recently repaired, with a new floor on lower deck. It has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. This boat has been constantly at work and has suffered no delay except for a short period when difficulties were encountered in crossing the track of the Mobile railroad. The machinery is all in good, and serviceable working order, as well as that of the derrick accompanying it. The original cost of the dredge was $25,000, and the derrick $5,000.

Dredge-boat No. 2.

Dredge-boat No. 2 is now engaged in following boat No. 3 in deepening the Lower Line canal, and is now located near the crossing of the Mobile railroad. The length is 70 ft. and the width 30 ft. The capacity of dipper is 1¼ cubic yards to the lift and average capacity per month 12,500 cubic yards.

The hull is six years old, showing no leaks and in good working condition; it has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. The boat has been laid up for several months, a portion of the time undergoing repairs, and only recently resumed work in deepening the canal, behing boat No. 3. The entire machinery of the boat, together with that of the accompanying derricks, is in good order and capable of doing effective work. The original cost of the dredge was $25,000 and the derrick $5,000.

Dredge-boat No. 4.

Dredge-boat No. 4 is now lying alongside of boat No. 1, in Upper Line protection levee canal, near Carrollton, and has not been provided with work for more than five month-. It is 70 feet long and 30 feet wide. The capacity of dipper is 1¼ cubic yards and the average capacity for dredging about 12,500 cubic yards per month. The hull is six years old, presents no signs of leaking, and the whole is in serviceable order. It has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. The derrick accompanying this boat had a new frame built about eighteen months ago, and the machinery, together with that of the main boat, is in good order and ready for any work to which it may be assigned. The original cost of the dredge was $25,000 and the derrick $5,000.

Dredge-boat J. O. Noyes.

The dredge-boat J. O. Noyes is located at the same point in Upper Line canal with boats Nos. 1 and 4, and has been idle for four months.

It is 62 ft. long and 19 ft. wide. The capacity of dipper is one cubic yard, and average capacity of boat for dredging work about 6,000 cubic yards per month.

The hull is three years old, perfectly sound and free of leaks, and has an upper deck with suitable accommodations for all workmen. The machinery is in good order, and the boat is ready for active service. The original cost of the dredge was $25,000.

Dredge-boat Clam Shell.

The Clam Shell is now lying at the — Lower Line canal adjacent to the Gentilly Ridge road crossing, and has been idle for several months. It is 65 ft. long and 30 feet wide, the hull is 6

years old, and shows a few leaks, but nothing serious. The boat was constructed under a patent for a new dipper, and other royalty appliances, and is therefore the most costly of all the boats. The dipper resembles a clam shell from which the boat derives its name, and is capable of performing an immense amount of work, in cleaning and deepening old canals, or taking out the border cuttings of a new canal. The capacity of the boat is about 15,000 cubic yards per month, when provided with suitable work or soft digging. The machinery is in good order and condition and the boat ready for active service. It has also an upper deck provided with suitable accommodations for all mechanics and laborers and everything about it in fair condition. The original cost of the boat and outfit was $40,000.

Dredge Called Ridge Boat.

The Ridge boat is now lying in the London Avenue canal, or tail-race near the London Avenue draining machine, and has been idle for four months. It is 83 ft. in length and 30 feet in width. The capacity of dipper is one cubic yard and average capacity for excavating per month 6,000 cubic yards. The boat was purchased from the city by the canal company, and a new hull built about five years ago. It was furnished with a new boiler and water pumps, and the entire machinery and hull is now in good and serviceable working order. It has like all the others an upper deck, etc. The cost of the dredge including the new hull, etc., was $18,000.

Steamtug.

The steamtug is used as a transport for conveying pieces of machinery and supplies from the central depot at Halfway house to the different boats when required. It is several years old, and when new cost about $2,000. It is in serviceable order.

Barge for Floating Derricks.

The barge for floating derricks is now lying with the boats tied up in the Upper Line canal, and is 60 feet long and 31 feet wide. The hull is in good order, and no leakage visible. The original cost was about $1,000.

Floating Boarding-house.

The floating boarding-house is 28 feet in length and 14 feet wide. It contains a stove, cook-room, store-room, with sleeping berths and dining hall and has a good shingle roof. The hull is in good condition, with no apparent leaks. It cost to build about $500.

Buildings at Halfway House.

These buildings are located on the east bank of the new canal, opposite the Halfway house, and serve as a central depot for the distribution of machinery and supplies and for making repairs. They

consist of a frame house used as a store-room and office. One blacksmith shop with tools and appurtenances, a carpenters' shed and outbuildings and cisterns, etc.

The ground upon which they are built was leased from the "Fireman's Charitable Association," but the lease is about expiring and will have to be renewed or the buildings removed. The original cost of improvements was about $1,500.

Assortment of Castings, etc.

This assortment comprises various castings both large and small as duplicates to the different parts of the dredge-boat machinery and they are all stored at the central depot near the Halfway house. Some of the principal pieces are, viz:

1 heavy cast-iron mainmast.
2 " " topmasts.
Hoisting and swinging drums.
Duplicate cog-wheels various sizes. A quantity of small castings representing duplicates for almost every part of the machinery in use. The original cost of this assortment of iron-work was about $5,000.

Valuation.

In estimating the value of the property above enunciated and especially that of the dredge-boats, I have been confronted with grave difficulties in determining exactly how the valuation should be made.

A dredge-boat is something which really has no true market value at all times corresponding with its actual cost, therefore, it can only be deemed valuable in proportion to the amount of profitable work it may have the prospect of executing in a fixed period of time. In the hands of the present owner who has by law a specific and valuable contract to execute, or in the contemplated possession and use by the city, the dredge-boats would certainly possess a positive usefulness and consequently have some fixed or definite value. Governed by this view of the case the conclusion has been reached that it would be just and equitable to make a valuation on the basis of the actual or original cost of the property, but with a deduction of 25 per cent. as an offset for wear and tear from use and deterioration by age.

The following result has therefore been attained and is respectfully submitted:

Dredge-boat No. 1, original cost	$25,000
" " 2, " "	25,000
" " 3, " "	25,000
" " 4, " "	25,000
Dredge-boat "J. C. Noyes," original cost	17,000
" "Clam Shell," " "	40,000
Total	$157,000

Dredge-boat Ridge boat, original cost	18,000
Derrick of No. 1, original cost	5,000
" " " 2, " "	5,000
" " " 3, " "	5,000
" " " 4, " "	5,000
Steamtug, original cost	2,000
Floating boarding-house, original cost	500
Buildings at Halfway house, original cost	1,500
Floating barge for derrick, " "	1,000
Various castings, etc., for machinery, original cost	5,000
Making a total of	$205,000
Less 25 per cent	51,250
Leaving a balance for valuation of entire property	$153,750

Damages Claimed.

The damages claimed by the transferee are for delays at various times and places and are enumerated according to the statements as follows, viz:

Delay on lake-shore protection levee (1872) 80,000 cubic yards. Delay in crossing Jackson R. R. (1873) 24,000 cu. yds. Delay in crossing Mobile R. R. (1875) 68,000 cu. yds. dredge-boats idle not supplied with work (1875 and 1876) 190,000 cu. yds. making a total of 362,000 cu. yds.

It is claimed by the transferee that without the delays above enumerated the boats would have executed and he would have examined on estimate of 352,000 cubic yards in excess of what has been returned from this office, and that the estimate is made in cubic yards for the purpose of determining by an allowance of what the work would have cost, what the probable profits would have been, and consequently the damages sustained. From an examination made of the records in this office and from personal knowledge of the facts of the situation, I am of the opinion that the claim presented is excessive and is susceptible of very considerable deduction. A communication has been found in the letter book under date of Aug. 15th, 1872, from Wm. H. Bell, city surveyor, to J. C. Noyes, notifying him by directions of the administrators of improvements, not to commence excavations for lake levee until a certain price of planking and timber work adjacent was completed. It is claimed that this notification delayed the boats which were then ready to commence work and that the delay was equivalent to the performance of 80,000 cubic yards of embankment—but I can find nothing further in the records to show exactly how many days the boats were idle on consequence of this notification, and, therefore, I am not prepared to recognize any specific amount for this claim.

The delay in crossing Jackson railroad may be a just claim, but there are no records in this office showing any negligence or unnecessary action on the part of the city authorities, or of the railroad company in hindering the prosecution of the work, and I am not

prepared in this case either to admit or to dispute the claim until competent evidence is produced to establish it.

The claim for damages in crossing the Mobile R. R. cannot be justly established, as by a compromise effected between the city, the railroad company and the transferee, the question of damages was adjusted beforehand, and allowances made in drainage warrants to the transferee for that purpose.

The item of 190,000 cubic yards for delays in boats not being supplied with work during the latter months of 1875 and up to the present time of 1876, is subject to certain modifications from statements and explanations hereinafter to be made.

The boats that have been idle up to the 1st May inst. are, viz:

Boat No. 1	5½	months.
" " 4	5½	"
" J. C. Noyes	4	"
" Ridge boat	4	"
" Clam Shell	4	"

Of the above boats the only ones entitled to a consideration for damages are No. "1," "4" and the "Clam Shell." These boats finished the interior work they were engaged upon last November, and were ready to proceed with the excavations for the lake-shore revetment levee, but were prevented from so doing by the refusal of the city authorities to allow the city surveyor to furnish the necessary lines and levels.

The J. O. Noyes was withdrawn from the Nashville Avenue canal and tied up without the knowledge or consent of this department, and therefore is entitled to no consideration or damages for her idleness.

The Ridge boat also is entitled to no consideration, as work was provided for it, but not accepted. The only boats therefore for which an assessment for damages can be entertained are No. 1, No. 4 and the Clam Shell; and I have deemed that the most equitable way to arrive at a conclusion is to make an abstract from the records of what these several boats earned in a certain period immediately anterior to being stopped, and accept this as a fair estimate of what they would have earned and been entitled to in cubic yards for the whole period of their delay:

			C. yds.
Boat No. 1,	5½ months, at	12,720 yds. per month	...69,960
" No. 4,	5½ " "	12,350 " "	...67,925
" Clam Shell,	4, " "	2,890 " "	...11,560
Making a total of			149,445 cubic yards

As far as the actual damages are concerned in money, I am not able to arrive at a conclusion and do not feel myself called upon to express an opinion. But with the facts before you and the suggestions which have been made, there will no doubt be sufficient data

for the committee to be enabled to arrive at something like a just and satisfactory conclusion in the premises.

Respectfully submitted.

(Signed) THOMAS S. HARDEE,
City Surveyor.

Copy of Drainage Warrant.

Filed with and made part of bill Nov'r 26, 1894.

(Copy.)

No. 379. DEPARTMENT OF PUBLIC ACCOUNTS,
$2,000.00. NEW ORLEANS, *June* 6, 1876.

To the administrator of finance, city of New Orleans:

Ord. 3539, A. S.

Pay to the order of W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, two thousand dollars out of any funds in the city treasury to the credit of said company.

Drainage warrant.

This warrant is issued in accordance with the provision of act 30 of the session of the General Assembly of the State of Louisiana, held in the year 1871, and the administrator of finance, on presentation to him of this warrant, will pay the same in cash, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant then the administrator of finance is required to endorse upon the same the date of its presentation, and this warrant shall bear interest at the rate of eight per cent. per annum from and after the date of such presentation and endorsement until paid.

Charge Mississip-i and Mexican Gulf Ship Canal Company.

(Signed) J. G. BROWN,
Administrator of Accounts.

Presented for payment June 6th, 1876.

(Signed) E. PILSBURY,
Administrator of Finance.

Endorsed: W. Van Norden, transferee.

Office Supreme Court U. S. Filed Dec. 17, 1898. James H. McKenney, Clerk.

Petition for Writ of Certiorari.

In the Supreme Court of the United States, October Term, 1899.

THE CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER, Respondent. } No. 172.

Samuel L. Gilmore, city attorney.
Branch K. Miller, solicitors for petitioner.

Filed —— —, 1898.

—— ——, *Clerk.*

In the Supreme Court of the United States, October Term, 1898.

THE CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER, Respondent.

Petition for writ of certiorari requiring the United States circuit court of appeals for the fifth circuit to certify to the Supreme Court of the United States, for its review and determination, the case of John G. Warner, appellant, *vs.* The City of New Orleans, appellee, No. 691, November term, 1897.

To the honorable the Supreme Court of the United States:

The petition of the city of New Orleans respectfully shows:

1. That it is a municipal corporation, created by the acts of the General Assembly of the State of Louisiana, No. 20, of the session of 1882, and No. 45 of the session of 1896, and a citizen of said State.

2. That on November 26th, 1894, John G. Warner, a citizen of the State of New York, in the circuit court of the United States for the eastern district of Louisiana, brought his bill in his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind as himself, to charge petitioner as the debtor of certain taxes averred to have been levied by lawful authority, for the payment of certain warrants, the collection of which was made the duty of petitioner, by certain statutes, hereinafter more particularly described; that the liability of the city was averred as the result of a certain contract which it was alleged she had broken, and her asserted disregard and violation, of certain duties imposed upon her by statute, as to the prosecution of certain work of drainage, and the collection of taxes aforesaid.

3. That it was averred by the bill, that by act No. 165 of March 5th, 1858, the legislature of the State of Louisiana provided for the leveeing, draining and reclaiming of swamp lands in certain portions of the parishes of Orleans and Jefferson; which for such purpose were

divided into three draining districts, to which, by a subsequent act of said legislature, a fourth draining district was added; that the appointment of a board of commisioners was provided for each district, who were invested with all rights and powers necessary to drain the same; that said boards were authorized to cause plans of said districts to be made, designating the limits of the sections or districts to be drained, the subdivisions of property therein contained, and the names of the proprietors; also, the dimensions and directions of the canals to be dug, and the places where pumping engines were to be placed; that upon completion, these plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted, in French and English, in two newspapers, for a stated period, announcing that the commissioners would proceed to drain such section, defining the limits thereof, and indicating as nearly as possible when the draining thereof would — complete, and also the possible cost of the work; that after publication had been made for a designated period, the commissioners were directed to apply by petition to a court in the parish of Orleans, for that portion of the section or district lying within that parish, and to the district court for the parish of Jefferson, for that portion of the section or district lying within that parish; which courts were directed, upon due proof being made of the publications or notices, to decree that each portion of the property situated within said limits was subject to a first mortgage, lien or privilege, in favor of the commissioners, for such an amount as might be assessed against said section or district, and interest thereon at 6 per cent. per annum from demand; that the said decrees should be recorded, by the recorders of mortgages for the parishes of Orleans and Jefferson, which lien, privilege and first mortgage, it was declared, should take precedence over all other mortgages, liens or privileges, whatsoever, whether tacit, conventional, legal or judicial.

4. That the said commissioners were given authority to levy such uniform assessment or assessments, upon the superficial or square foot of lands situated within their respective draining districts or sections, to defray the expenses of the construction of levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of the act; that it was further provided, that on the non-payment of said assessments, judgments should be recoverable, before any court of competent jurisdiction, and the lands assessed should be sold, according to law.

5. That by act No. 191 of the General Assembly of the State of Louisiana, approved March 17th, 1859, provision was made for the issue of bonds designated as "draining bonds," in order to carry into effect the provisions of act No. 165 of 1858; that upon the issuance of the bonds, the board of commissioners should fix and determine the amount of the assessment, to be levied upon the superficial or square foot of the lands situated within the draining district of each board, in accordance with the act of 1858, and to fix and apportion the amount to be paid yearly by the owners of said lands, in order to pay the interest on said bonds as might mature, and the manner

of redeeming such bonds, was provided for in other sections of said act of 1859.

6. The bill further recites, that by the act of the legislature of the State of Louisiana No. 57 of 1861, entitled "An act to provide for the collection of the assessments for drainage, under the acts of March 18th, 1858, and the supplementary act thereto of March 17th, 1859," it was enacted, that the amount of assessments levied as aforesaid, should be collected and sued for in the manner following: That as soon as any assessment had been made, notice thereof should be given, a copy filed in the third district court of New Orleans, for assessments on property within that parish, and in the third judicial district court for the parish of Jefferson, for assessments made on property within that parish; that the said tableaux of assessments to be thus filed should set forth the amounts assessed, and the names of the owners of the lands, if known, and if the owners' names were unknown, the fact to be so stated; that a petition should be filed with the said assessment-rolls, praying, and an order rendered thereon, that all persons whom it might concern should show cause, within thirty days from the first publication, if any they had, why said assessment-rolls should not be approved and homologated, and that after due observance of this requirement, the said courts should, upon motion of counsel for the boards of commissioners, approve and homologate said assessment-rolls, which should be a judgment against the property assessed, and the owners thereof, on which execution might issue, as on judgments rendered in the ordinary mode of proceedings.

7. That by the act of the legislature of the State of Louisiana, No. 30, of its session of 1871, the Mississippi & Mexican Gulf Ship Canal Company, a corporation then existing, and domiciled in the city of New Orleans, was authorized and empowered to excavate drainage canals and build protection levees within the limits of New Orleans and Carrollton, on the terms and condition expressed in said act, and authorizing said company to excavate all canals, and to build all levees, to be designated and fixed by the board of commissioners of the city of New Orleans, the said act itself pointing out in certain parts, how and by what means the work of drainage should be executed by said company, and prescribing certain other details thereof; that by said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed for that purpose, to examine the work done by said company during each month, and certify to the same; that it was made the duty of the administrator of accounts, on presentation to him of said certificate, to draw a warrant on the administrator of finance, in payment of the work so done, at the rate of fifty cents per cubic yard for excavations, and fifty cents per cubic yard for levees built; that these warrants it was the duty of the administrator of finances to pay on presentation to him, in case there were any funds in the treasury to the credit of said company; but that in the absence thereof, in whole or in part, the said administrator was required to endorse upon each warrant not so paid, the date of its presentation; from which date it should bear interest at the rate of eight per cent. per annum, until paid.

That in order to provide funds for the payment of such work, the boards of commissioners for each one of the several districts aforesaid were directed to transfer to the board of administrators of New Orleans, all moneys, assessments, and claims for damages, in their hands, or under their control, all titles to real estate, books, plans, tableaux and judgments in favor of the commissioners, the office furniture of the latter, a true statement of the claims of the commissioners against the city of New Orleans, to be adjudicated and settled out of money collected by the city, and pertaining to said drainage districts; and that the board of administrators should be and were thereby subrogated to all rights, powers, and facilities, possessed by the commissioners of the several districts, and the said board of administrators were directed to collect from the holders of property within the districts the balance due on the assessments, as shown by the books, which the bill avers were thereby confirmed and made exigible; to make an assessment of two mills per superficial foot in those parts of the three existing drainage districts, and on such other lands as should be brought within the protection levees contemplated by said act No. 30, of 1871, where no assessments had been made; and to execute and enforce the same, as provided by the several acts of the legislature creating and regulating said boards of commissioners; that all moneys so received from said commissioners, as well as by the collection of claims for drainage then due, and from the collection of assessments, and from any of the sources contemplated, should be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, to be held as a fund applicable to the drainage of New Orleans and Carrollton; and that all property, not money, so received, should be held in trust for the payment of said company.

8. It is further set up in the bill, that in accordance with the direction to that end contained in act No. 30, of 1871, the board of administrators of the city of New Orleans, by ordinance, created the fourth drainage district, embracing lands not contained in any of the three districts established by the act of 1858.

9. Proceeding, the bill sets forth, that the boards of commissioners were duly appointed, qualified, and entered upon the discharge of their duties, and did all of the acts, such as the making of plans, procuring the homologation of the same, the levying of the assessment, and having the same homologated by judgment, in accordance with the provisions of the several statutes hereinbefore mentioned.

10. The bill charges, that the board of administrators of the city, in compliance with act No. 30, of 1871, took possession of all the moneys, rights and privileges described in said act, and became possessed of all the means necessary to carry out the objects of the statutes aforesaid, and provide for the payment of all drainage warrants that might be issued under said act No. 30, of 1871; that the amount of the assessment handed over to the city of New Orleans, in the first and second districts, was $790,621.42; *those* in the third and fourth districts was $909,915.74; making a total of $1,699,637.16, of which there was assessed against the city herself, on streets and squares, as

follows: In the first district $223,110.60, in the second district $199,885.47, in the third district $207,441.46, in the fourth district $65,956.77; that on these assessments there had been collected from individuals, by the city of New Orleans, between the time she took charge, as aforesaid, and the 7th of June, 1876—the date of the sale from Van Norden and the canal company to the city, thereafter referred to in the bill—in cash, $78,748.51, and in drainage warrants, paid in pursuance of ordinance 2460, annexed to the bill as part of it, $151,174.16, leaving outstanding and due, on the books, a balance of $1,499,714.47, including the said sums which the bill claims were due by the city herself on streets and squares.

11. That on the 22d of May, 1872, the canal company, for a valuable consideration, assigned, transferred and set over, to Warner Van Norden, all its right, title and interest in and to the privileges and advantages granted it by the aforesaid act No. 30, of 1871; and by another act of sale, on November 22d, 1872, the company, for a valuable consideration, sold and delivered to said Van Norden all of its dredge-boats, derricks, flat-boats, and other property used in dredging.

12. The bill then avers that from the time the said board of administrators took charge, in June, 1871, pursuant to said act of 1871, a vast amount of drainage work had been done by the canal company and Van Norden, its transferee; that twelve miles of old canals were widened and deepened, and thirteen miles of new canals were dug, and that a corresponding amount of protection levees *were* built; the said work being in all respects conformable to the acts of the legislature, and the designs of the board of administrators, who duly approved and accepted the work; that to complete the entire system of drainage it was only necessary to complete a gap on the shore of Lake Pontchartrain, and the placing in position of the pumping engines on the lake shore, which was the duty of the city, under said act No. 30, of 1871.

13. It is then averred by the bill, that by act No. 16 of the legislature of Louisiana, approved March 24th, 1876, the city was authorized and empowered to contract with the canal company and Van Norden, as transferee thereof, for the purchase of the former's rights, franchises, tools, apparatus, implements, machines and boats, the purchase price to be paid in drainage warrants, payable out of drainage taxes, imposed under the several acts of the legislature hereinbefore set forth; and that after an appraisement, on the 7th of June, 1876, the said purchase was made, the city receiving from the said company and its transferee, the machinery, boats and other property of great value, for which it agreed to pay in drainage warrants three hundred thousand dollars, which were delivered to Van Norden, transferee, aforesaid; that complainant is the owner of three of said warrants, for the sum of two thousand dollars each; that the suit is brought thereon, as well as on the assignment, transfer and subrogation of Van Norden to complainant, of all his right, title and interest in and to said warrants, as well as of each and all rights of action which he had or has against the city of New Orleans, arising in his favor out of the said act of sale of June 7th, 1876, or the ac-

tion of the city of New Orleans thereunder, by reason of its failure to collect said drainage taxes, or by reason of the city to complete the drainage work, to the end that said taxes might be collected.

14. The bill then recites, that the said act No. 16, of 1876, providing for the payment of the purchase price of said dredge-boats, and other property, and by the issuance and delivery of drainage warrants, payable out of drainage taxes, was a new designation of said taxes by the legislature, which could not be diverted until said drainage warrants were fully paid, and placed said taxes beyond any claim that could be urged against them by the city of New Orleans, or by any other party or person whomsoever, especially as the city became the owner of said dredge-boats, franchises and implements, without paying her own money or property, or giving any personal obligation therefor.

15. That after said purchase the city alone was possessed with sole power, as well as the necessary tools and outfit, to complete the necessary system of drainage, and had the duty cast upon her to complete said system, or build and complete some other system of drainage; but that from the date of said purchase, in June, 1876, and notwithstanding said drainage work had, from the very commencement thereof, by the company, in 1871, and the prosecution thereof by Van Norden, as transferee, from May, 1872, been proceeded with with great vigor, and over two-thirds thereof had been completed, the city ceased all work on said system, and never thereafter commenced or completed any other, but sold some of the machinery so purchased, diverted the proceeds of taxes to other purposes than the payment of drainage warrants; and allowed others of said boats to sink or rot unused, and all notwithstanding that they were in first-class condition when received from the vendor; and thus rendered herself incapacitated for the completion of the drainage work aforesaid, or for any other work of drainage whatsoever; allowed the canals dug by said company and transferee to fill up, and to remain filled, with filth and sediment, thus becoming useless and worthless, and, in fact, destroyed a vast amount of work already done, to a very large extent.

16. The bill further sets out, that ever since its purchase the city had done nothing to compel or enforce the payment of drainage taxes, except to keep an office in the city hall, where the agent of Van Norden might induce drainage-tax payers, by persuasion, to pay their taxes, where some were paid, but the amount unknown to complainant, and that the same had never been accounted for; that the city, by proclamation of its mayor, advised the tax-payers not to pay the taxes, and by reason of her conduct in not completing the system, nor adopting any other to drain the land, the supreme court of Louisiana, in Davidson *vs.* New Orleans, in March, 1882 (34th La. An. Rep., pp. 170 to 178), decided that the said taxes could not be collected, which decision from the date thereof, became the settled jurisprudence of the State, whereby large amounts of drainage taxes were cancelled, and that the remaining had become of little or no value; that the city, by report of a special committee of its council, pointed out to drainage-tax payers, how, under the Davidson deci-

ion, they might avoid payment thereof, which suggestion put forth by the city, while trustee of the said fund, and the collector thereof, had ever since been largely adopted and enforced, and large amounts of drainage taxes erased and lost in consequence thereof; that in suits brought by tax-payers for this purpose the city made no defense; that the city, by other ways and means unknown to complainant, destroyed said fund, until, so far as the courts of Louisiana were concerned, the same became unenforceable, and so, utterly worthless to the holders of the warrants given for the purchase of the dredge-boats, etc.; this express violation of the express covenant contained in said act of sale and purchase, not to obstruct or impede, but, on the contrary, facilitate by all lawful means, the collection of said drainage-tax judgments, until all of said warrants should have been paid in full.

The bill proceeds, averring, that on some occasions the city had claimed the drainage taxes as her own property, and had been allowed the full benefit thereof in payment of her own debts, especially in a certain suit, where, being sued for an indebtedness of the commissioners of the city park, in a large sum of money, she claimed said sum sued for, should be credited upon the drainage taxes, amounting to $25,725.96, assessed against another portion of the tract of land, concerning which the city was sued; that this offset was allowed, for which, with 6 per cent. per annum, from the date of its allowance, she should account to the warrant-holders; the bill then proceeds to vindicate the excellence of the plan according to which the work was to be done, which it charges, if carried out, would have protected the lands from overflow from without, and would have removed all drainage from within.

17. The twenty-fourth paragraph sets forth, that at the time of the sale by Van Norden and the canal company to the city, the drainage assessments then uncollected amounted to $1,469,715.41; that the city, after her said purchase, not only had all the necessary authority, outfit and equipment, to have completed the said system of drainage, or to have adopted or completed some other sufficient system that would have drained the lands, and made them available for the payment of the warrants given for the purchase aforesaid, but that she had likewise an unexhausted and unrestrained power of taxation, under which, by a tax on all the property within the city of New Orleans, she could have supplied herself with sufficient means to have completed said system, or any other system; but that, in violation of her duty, and in repudiation of her obligation, she abandoned all pretense of draining, in any way whatever, and destroyed the very source from which she had bound and obligated herself to pay the warrants given for said purchase, sometimes pretending that the said taxes were illegal and unconstitutional, by reason of certain acts of the legislature of Louisiana, all of which, the bill avers, were void, as repugnant to the Constitution of the United States, especially section 10, article 1, and the 14th amendment thereof; and at other times pretending that said taxes were uncollectible, because the lands were not worth the amounts imposed thereon; which complainant avers, was without foundation

in fact, the only reason why the lands on which the taxes were levied were not worth the amount of the taxes being because the city had refused to drain them, either by completing the system, or keeping open and cleaning the canals already dug.

It is then charged, that by the said act of purchase of 1876 the city, in addition to the former duties imposed upon her, of trustee for the collection and payment of said taxes, became the voluntary and contractual trustee for the collection of taxes then due, and was bound to use her utmost authority for the collection of the same, under the terms of the said sale, and to disregard all the illegal and unconstitutional acts of the legislature aforesaid; thus having done everything in her power to destroy said taxes, and defeat their collection, notwithstanding various suits brought against her for her dereliction of duty in this regard, which suits are enumerated; that in consequence she had become accountable to complainant and other holders of drainage warrants, for all moneys collected and not paid to drainage-warrant holders, for all moneys misapplied, and also for such sums as might have been collected, had the city done her duty in the premises, and which have become lost and wasted because of the said non-fulfillment of duty as voluntary and contractual trustee, between the time she took charge, in June, 1871, to the time a receiver was appointed, in June, 1891, especially between the date of the sale by Van Norden and the company, June 7th, 1876, to June 13th, 1891.

18. The matter contained in the twenty-sixth paragraph of the bill, as to complainant's anticipation that the city would plead its issue of certain bonds, in discharge of the liability sought to be fixed upon it, may be disposed of by a mere reference, as the answer to a certified question from the court of appeals to this honorable court, to be hereafter more particularly dealt with, renders this part of the bill unimportant for the present purpose.

19. On February 4th, 1895, defendant filed its demurrer to the bill, general and special; the points made by the said demurrer were:

First. A denial of the jurisdiction of the circuit court, on the ground that plaintiff suing, as the assignee of Van Norden, himself the assignee of the canal company, which was a citizen of the State of Louisiana, was incompetent to maintain a suit in the circuit court against the defendant, likewise a citizen of Louisiana, the act of Congress prohibiting such suit by the assignee of a chose in action, where the assignor could not maintain such a suit.

Second. That all the matters and things alleged in the bill, had been finally adjudged by the circuit court in the case of Peake vs. New Orleans, as also, on appeal, by the supreme court, as would appear by its decision in volume 139 of the United States Reports, p. 342.

On February 26th, 1895, the demurrer of the defendant was sustained, and the bill dismissed, at the costs of complainant; whereupon the case was carried by appeal to the court of appeals for the fifth circuit.

20. On May 14th, 1895, the court of appeals, upon a statement

made by itself, requested the instruction of this honorable court upon two points, stated in the following questions:

First. Is the city of New Orleans, under the warranties, express or implied, contained in the contract of sale of June 7th, 1876, by which she acquired the property and franchises from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge of her own liability to that fund on account of assessments on streets, public squares, etc.?

Second. Should the decision in the case of James W. Peake *vs.* City of New Orleans, 139 U. S., p. 342, be held to apply to the facts in this case, and operate to defeat the complainant's action?

The first of these questions this honorable court answered in the affirmative; the second it declined to answer.

Warner *vs.* New Orleans, 167 U. S., pp. 473–478.

On May 31st, 1897, the mandate of the supreme court was filed in the court of appeals; whereupon, on June 10th, 1897, the court of appeals reversed the decree of the circuit court, and remanded the cause, with instructions to overrule the demurrer, and thereafter proceed as equity and good conscience may require.

The opinion found in 81st Fed. Rep., p. 650, is based upon two grounds:

First. That the city is estopped from pleading her bond issue as a discharge of her obligation to account for drainage taxes collected on private property, and as a discharge of her own liability to that fund, as assessee of the streets and squares; citing Warner *vs.* New Orleans, 167 U. S., 467; thus following the answer of the supreme court to the first question certified.

Second. That on the case made by the bill, the decision of the supreme court in Peake *vs.* New Orleans, 139 U. S., 242, does not necessarily apply to the facts of the present case, nor operate to defeat the complainant's action.

The opinion then stating, that "it follows that the circuit court erred in sustaining the demurrer to the complainant's bill."

21. After the filing of the mandate of the court of appeals, on July 1st, 1897, and the entry of a decree by the circuit court, in accordance therewith, defendant, on October 30th, 1897, filed its answer, setting up specially the following defenses:

First. That the acts 166 of 1858, 191 of 1859, 57 of 1861, and 30 of 1871, propounded a system of drainage for the city of New Orleans, the expense of which was to be borne by the owners of the lands drained, to be collected from them by assessments based upon the prospective benefits proposed by the drainage; that the assessment-rolls, like the plans preceding them, were to be filed in certain courts, and while these assessments, levied in advance for prospective drainage and benefit to the lands, imported no liability if the drainage failed, and was of no benefit to the lands, the acts providing for the homologation of the plans, though creating only such provisional

liability, should subject the lands to a lien and privilege to secure the cost of the drainage; and that the judgments homologating the assessment-rolls, though creating only such conditional liability, should be judgments against the lands and owners thereof, on which execution might issue; that said plans and assessments, without warrant or authority of law, embraced public streets, parks, squares, and other places, or "public things," not subject to taxation, or to assessment for local improvements, or to any form of taxation; that as to the assessments on property owned by private persons, based on prospective or anticipated draining, they were resisted by the owners, on defenses which were sustained by the courts.

Second. A special denial that the assessments on public streets, parks, squares, or other "public things," were, or were ever due or owing; together with a denial that the act of 1871, or any other act, confirmed or made exigible such void assessment; that the inclusion by the said boards of commissioners of the public streets, and places of like character, was illegal; that the act giving the board of administrators authority to create the fourth drainage district was unconstitutional, as was held by the supreme court of the State of Louisiana in the succession of Patrick Irwin, 33d La. An. Rep., p. 63.

That no judgment of homologation or approval by any court, particularly such as were averred in the bill, could exceed, transcend, or have any greater effect, than the authority contained in several acts, so as to permit or give any validity to asses-ments for taxes other than those made upon or against private property, or property owned by private persons, nor could they in any manner, or to any extent, give validity to any assessments made or taxes levied against public parks, public squares, or other "public things," or to create even the color of a charge of liability against the city of New Orleans.

Third. That the work done by the company and its transferee was defective and insufficient, and that by reason of the defective plan by which it was constructed, its failure was inevitable.

Fourth. That in 1876 the General Assembly of the State, by act No. 16 of that year, was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by defendant of the dredge-boats, franchises, and other property of the company, for a price in drainage warrants, payable out of drainage taxes.

Fifth. That there was no obligation imposed on defendant by the act of 1871, or the act of 1876, or in any manner by law, to the warrant-holders, or to the payment of warrants, or in respect to the same, save a proper diligence to collect the taxes out — which the same were payable, and apply the collections to their payment, and that the duties thus imposed by the legislature, defendant had fully performed.

Sixth. A denial of any destination by the act of 1876 of the drainage taxes, otherwise than to direct that those collected be applied to pay the warrants, and it was denied that the act of 1876 gave any validity to the void assessments and taxes on public streets,

and property of a like character; also, that a single dollar of taxes collected from private property had ever been diverted from drainage-warrant holders, the single obligation of defendant being to account for taxes collected; a denial was further made that the city, under the act of 1876, was made the voluntary and contractual trustee for the collection of the same.

Seventh. A denial that prior to the act of 1876, there was imposed upon the city the duties of a trustee for the collection and payment of drainage taxes, or any duty whatsoever, save to account for the collection of assessments on private property; that defendant discharged its full duty under the act of 1876, as to the collection of taxes, the failure to collect many of which was due to the law applicable to the same, as laid down by the supreme court of Louisiana; that its efforts to collect were continued and persistent; that all that could be collected had been collected and accounted for.

Eighth. A denial of any neglect of duty with regard to the work of drainage, or its completion.

Ninth. A denial of any failure or neglect to defend suits, brought for the cancellation of drainage taxes.

Tenth. A denial that the acts of the legislature of Louisiana, Nos. 48 and 67, of 1877, and No. 20, of 1882, section 42, were void, as in violation of the Constitution of the United States.

Eleventh. That by its bond issue of $1,672,105.21, under act No. 73, of 1872, if respondent were liable for the assessment on streets, and places of a like character, the same was fully paid by said issue of bonds, which latter was fully known to all drainage-warrant holders, especially to Van Norden; that he, or his assignees or pledgees, were holders of a large amount of drainage warrants redeemed by said bonds; that they were fully apprised of the said bond issue and the discharge resulting therefrom, and that complainant cannot urge that defendant did not assert said discharge, known in its full scope and effect at all times to Van Norden, and never controverted by him, or any warrant-holder.

Twelfth. A denial that the act of 1876 was in any line or word a recognition of the so-called "drainage fund," as it then stood on the records of the city or mortgage office, and had not been discharged in any manner, etc.

Thirteenth. That the dredge-boats and other property acquired by respondent from the company and Van Norden were of little or no value, and, in any event, infinitesimal as compared with the price paid, and that the sale thereof for the amount paid was a fraud upon defendant and its tax-payers.

Fourteenth. That all taxes collected had been faithfully accounted for; that in the suit of Peake *vs.* New Orleans, No. — of the circuit court, defendant had been ordered to render, and had rendered an account of all drainage taxes, and there was no reason to renew the call or order for such account.

Fifteenth. That by the amendment of the constitution of the State of Louisiana proposed by the General Assembly in 1874, and which went into effect January 1st, 1875, the city was prohibited from thereafter increasing its debt in any manner, or from issuing any

evidence of debt, or warrant for the payment of money except against cash in the treasury, the said amendment providing that it should not prevent the issue of drainage warrants, to said Van Norden, transferee of said company, under act No. 30, of 1871, but payable only from drainage taxes.

That said warrants, by the law of their creation payable only from drainage taxes, never, after that amendment, could become part of respondent's debt, nor could any omission of duty on the part of respondent, in respect to drainage, the collection of taxes, nor any act or conduct of respondent, nor any act of the General Assembly, nor purchase of property under said act, bind or obligate respondent, after such amendment, for the payment of any such drainage warrants, or for the purchase price of said property, or for any drainage warrants issued for such price, or for any debt or liability whatever in respect to drainage; nor did said act of 1876, or contract of purchase, attempt to impose on this respondent any such prohibited liability, but in accordance with said amendment, the price of the property directed by said act to be purchased, could be paid only from assessments on private property, out of drainage taxes alone.

Sixteenth. The defense based upon the decree of the circuit court, and of the supreme court, in J. W. Peake *vs.* New Orleans, No. 11614 of the docket of the circuit court, and No. 852 of the October term of 1890 of this court, which decrees of said courts are *res judicata*.

Seventeenth. That the demands of complainant set up in the bill were barred by the prescription or statute of limitation of five years, established by articles 3540 and 3541 of the Revised Civil Code of Louisiana; also by the prescription or statute of limitation of ten years, established by articles 3544 and 3547 of the Civil Code.

22. That after filing of complainant's replication, and the taking of evidence, the cause came on to be heard in the circuit court, and in March, 1898, the circuit court entered a decree in favor of the defendant, dismissing the bill; on March 12th, 1898, complainant was allowed an appeal to the court of appeals; that on April 2d, 1898, the case was called for trial in that court, before Judges Pardee and McCormick, circuit judges, and Swayne, district judge; that on May 17th, 1898, the court made a decree, finding:

First. The city of New Orleans a debtor to complainant in the sum of six thousand dollars, with eight per cent. per annum interest from June 6th, 1876, as stipulated in the warrants sued on, to be paid out of the drainage assessments set forth in the bill.

Second. That said assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, were declared to constitute a trust fund in the hands of the city of New Orleans, for the purpose of paying the claims of complainant, and other holders of the same class of warrants.

Third. That it be referred to one of the masters of the court, to take and state an account of all said drainage assessments; that in taking such account the master was directed to charge the defend-

ant, as well with the amount of drainage assessments against the city, on the areas of the streets, squares and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected, and properly expended by defendant, in the execution of the trust, but that no offset should be allowed for the bonds issued in exchange for drainage warrants, under the act of 1872.

The opinion of the court was delivered by Swayne, district judge, and was based upon the following considerations:

First. That the attempt of the answer to fasten the responsibility for alleged defects in the drainage plan upon the canal company and Van Norden, as a defense to the action, was entirely unsupported by the evidence.

Second. That the city was a trustee, under the express duty to do whatever was reasonably required to make the drainage fund available; that it was by reason of her own default, in not completing, but abandoning the work, that this was not accomplished; that equity looks upon that as done which ought to have been done; that the city must, therefore, be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund as if collected and in hand; that the city, under the principles laid down by the Supreme Court of the United States in the present case, was estopped to deny that the assessments upon streets, and other public places, and the judgments thereon, were void *ab initio;* that she was thus estopped to the same extent as she was from setting up the issue of bonds under the act of 1872, as a discharge of her general liability as trustee, with reference to the fund; that as an original proposition, however, the authorities seemed to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of an estoppel.

Third. That by certain decisions of the supreme court of Louisiana, it was held, that the city of New Orleans was liable for the assessments made on the area of streets, under statutes similar in all respects to the acts here involved, except that the assessments in the cases cited had not been ratified by the legislature, as had been done in this instance by the act of 1871; that the matter of local assessments had been the subject of judicial inquiry in other States, notably by the supreme court of Illinois, where all of the objections raised in the present case had been elaborately considered, and decided in harmony with the case above quoted; that whether the obligation for the drainage assessments had its origin in the original acts of 1858, 1859 and 1861, or was cast upon the city by the act of 1871, confirming the assessment-rolls, upon which the city was named as a debtor, or resulted from judgments based on these rolls, the amounts of these assessments constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation, such power being the usual, and in some cases the only, method by which municipal corporations can discharge their indebtedness; citing United States *vs.* New Orleans, 96 U. S., 381; Wolff *vs.* New Orleans, 103 U. S., 358.

Fourth. That the constitutional amendment of 1874, which prohibited the city from increasing her debt in any form, or in any manner, or under any pretext, was no defense, the assumption to that effect being based on the theory that the assessments against the city were at the time void, and that to now enforce them would increase the city's debt; that the court could not concede the correctness of the argument that the city was not, when the amendment went into effect, the primary debtor of the assessments against private property, and that if the court should now impose a liability on the city for the dereliction of duty charged in the bill, it would create a new debt, which would come within the prohibition; the opinion declared that it was true that the amendment prohibited any increase of the city debt, after January 1st, 1875, but it also expressly provided that it should not prevent the issue of drainage warrants to the transferee of the contract, under act 30, of 1871, payable out of drainage taxes; that it seemed clear to the court that by express terms the amendment excluded, and intended to exclude from its operation, the liability of the city growing out of its relation to drainage matters, including the city's liability as assessee of the streets and public places, as shown by the assessment-rolls; that, indeed, it would seem to be that the authority to issue warrants against the drainage fund after that date necessarily implied an affirmance of the right of the city to proceed to the completion of the drainage work then in progress, and to impose a corresponding duty on the city to collect and apply all the drainage assessments to the payment of the warrants, and hence, that these taxes being then liabilities of the city, could not, by any cause or reason, be included in the clause prohibiting the increase of debt, without imputing to the authors of the constitution an intent to defraud those who might deal with it under the invitation of the constitution.

Fifth. That even admitting that the purchase created a debt in excess of the limitation, the most that could be said was that it made an error of law, which, according to article 1846 of the Civil Code of Louisiana, cannot be alleged to acquire the property of another.

Sixth. That the only remaining question which required consideration was the plea of prescription, which the court thought could not be maintained, for the reason that the act of sale created an express trust, in which the city undertook as a trustee to collect and apply the drainage assessments to the payment of warrants for the price of the property sold it; moreover, that it was doubtful whether statutory assessments of the character in question were subject to any prescription at all.

23. From this decree the city of New Orleans obtained an appeal to this honorable court, which was, on the 20th day of October, 1898, dismissed, on the authority of Union & Planters' Bank *vs.* Tennessee, 152 U. S., p. 454, and Sawyer *vs.* Kochersberger, 170 U. S., 303.

24. That it having thus been established, that no appeal lies to this court from the court of appeals, your petitioner is moved to apply to this court for a writ of certiorari in the premises.

That your petitioner is advised and believes that the said judgment of the United States circuit court of appeals for the fifth circuit is erroneous, and that this honorable court should require the said case to be certified to it, for its review and determination, under and in conformity with the provisions of the sixth section of the act of Congress, entitled "An act to establish the circuit courts of appeals, and to defind and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, the said case being made final in the said circuit court of appeals by said act.

25. That the questions involved in this case are of great gravity and importance; that upon its correct determination depends the liability *vel non* of the defendant for three hundred thousand dollars, with eight per cent. interest per annum from June 6th, 1876, which would amount, at the present time, to a sum in excess of eight hundred and twenty-eight thousand dollars, the question of liability being governed by nice and difficult questions of law and fact, which have been misapplied, or not fully understood by the court of appeals.

26. That the case was decided in said court of appeals, and all of petitioner's defenses, save one—that of *res judicata*, which was not decided at all, nor even mentioned in the opinion,—overruled upon the supposed authority of the opinion of this honorable court in Warner *vs.* New Orleans, 167 U. S., 467; that as a matter of fact, of the numerous defenses set up by petitioner's answer, only one was presented and involved in the case mentioned, and that presented in manner, form and conditions, differing in toto from that involved in Warner *vs.* New Orleans, 167 U. S., 467.

27. That in said case there were certified to this honorable court two questions alone, the first, being whether the city was estopped to plead her bond issue as a payment of her obligation for drainage taxes collected, or which it failed to collect, and of its liability, as assessee of streets and other public places; the second, whether the present case was governed by the decision of your honors in Peake *vs.* New Orleans, 139 U. S., 342; that the first question this honorable court answered in the affirmative, and declined to answer the second at all; hence, the assumption of the court, in the first sentence of its opinion, that, "as to nearly all of the defenses raised, we might well rest our decision on the opinion of the supreme court, expressed in answer to the certified question," is unfounded.

28. That the court erroneously held, that under the principles laid down by your honors in the case above mentioned, that the city was estopped to deny the existence and validity of the assessments against it, as quasi-owner of streets and other public places, to the same extent that it was estopped from setting up the issue of bonds under the act of 1872 as a discharge of its general liability as trustee with reference to that fund, and that whether it be true or not, as the court declares, that the authorities seem to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of any estoppel, it is beyond question that the acts of 1858, 1859 and 1861, under which the as-

sessments were levied, did not contemplate the liability of public property therefor, but were intended to include private property alone; that the language of these statutes would clearly place the assessments on public property in question beyond the reach of the principle which the court declares seemed to be affirmed by the authorities.

29. That the decisions of the supreme court of Louisiana cited in the opinion to sustain the proposition that streets, and property of a like character, were liable to assessment, are all based upon special statutes, presenting no feature in common with those involved here, as concerns the questions at issue.

30. That the court erred in holding that the constitutional amendment of 1874, prohibiting the city from, in any form or in any manner, or under any pretext, increasing its debt, was an authority for, instead of a prohibition against, any increase of debt; that the authority therein contained to draw drainage warrants, payable out of drainage taxes, which the court says necessarily implied an affirmance of the right to proceed to the completion of the drainage work then in progress, and imposed a corresponding duty upon the city to collect and apply all drainage assessments to the payment of warrants, was neither justified nor excused by anything contained in the amendment; the authority to draw the warrants, payable out of drainage taxes alone, following the prohibition of increasing her indebtedness, gave point and emphasis to the latter; the supposed necessary implication, of an affirmance of the right of the city to proceed to the completion of the drainage work which was then in progress, is overborne by the fact that such work was then being conducted not by the city, but by the canal company and Van Norden, the city having no connection with it at all, until after its purchase in 1876, about two years and a half after the amendment was proposed.

31. That the court was mistaken in declaring that the question of prescription was the only one remaining, after having disposed of those mentioned, it having left unnoticed the plea of *res judicata*, set up in the answer; that the prescriptions were that of five years established by article 3540 of the Revised Civil Code of Louisiana, applicable to all effects negotiable or transferrable by endorsement or delivery; that of ten years established by article 3544 of the Revised Civil Code, applying to all personal actions, of any character whatsoever; that of ten years established by article 3547 of the Revised Civil Code, applying to all judgments.

That all these pleas of prescription were overruled by the court, on the single ground that the act of sale created a trust, under which the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, a ground wholly untenable in Louisiana law, under which, by article 3530 of the Revised Civil Code, to enable a debtor to claim the prescription which operates as a release from debt, it is not necessary that he produce any title, or hold in good faith, the neglect of the creditor alone operating a prescription in such case, and under article 3550, that good faith is not required on the part of a person pleading this prescription; that

these two articles, and that, barring all personal actions by the lapse of ten years, would apply to that part of complainant's bill which sought to hold defendant responsible for its non-collection of assessments due on private property; that the prescription of ten years, by which judgments are extinguished, established by article 3547 of the Revised Civil Code, would have direct application to judgments for drainage taxes against the city herself; that as to these judgments she was not a trustee, but a debtor; that she was charged with no duty of saving them from prescription by suits for their revival, as, in any event, it was legally impossible for her, as plaintiff, to institute a suit against herself, as defendant, for their revival, while article 3547 left with complainant, and those similarly situated, the power, by timely suits for reviving the same, to save such judgments from extinguishment by prescription, the said article allowing any one interested in a judgment to bring a suit for its revival.

32. That besides the numerous defenses set up in the defendant's answer, only three of which are noticed in the opinion of the court of appeals, namely, that the drainage plan of the canal company was fatally defective, and could never furnish the basis for a successful drainage system, that the streets, public squares, etc., were not liable to assessment, and the plea of prescription; defendant pleaded the defense of *res judicata*, based upon the decree of the circuit court, and of this honorable court, in the case of Peake *vs.* The City of New Orleans; that if this plea was well founded, it would have extended the whole length of plaintiff's bill, and would have completely barred all the relief it sought; that the plea was based upon the fact that in the said case of Peake, James Jackson appeared, by intervening bill, as the holder of five purchase warrants identical in character with those sued upon by the complainant, namely, part of those given in payment of the price of the city's purchase of dredge-boats, etc., from the canal company and Van Norden; that the decree in the Peake case was a dismissal of complainant's bill, and of all intervening bills; that the decree upon the warrants sued on by Jackson was decisive of the status of the whole series of purchase warrants.

That this plea of *res judicata* was not mentioned by the court in its opinion, on account of which it may be said that it was not considered, and if so, defendant has had no hearing upon this branch of its case.

33. That the court was grossly in error in decreeing that the city was the absolute debtor of the drainage warrants sued upon; that all the bill sought to do was to obtain an accounting of the drainage taxes; that in no event were the drainage warrants sued upon to be considered unconditional obligations of the city until it was shown that all of the taxes had been lost, misappropriated or misapplied by the city, even if then, which is denied.

34. That in the circuit court of appeals, as part of its petition for a rehearing, defendant filed an assignment of errors for the purposes thereof; that it was in words and figures as follows, to wit:

First. That this honorable court, the United States circuit court of appeals for the fifth circuit, is and was without jurisdiction to

hear and determine this cause; that the case involves the construction and application of the Constitution of the United States, especially section 10 of article 1, and also the 14th amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which involves the construction or application of the Constitution of the United States.

That in this case certain laws of the State of Louisiana are claimed to be in contravention of the Constitution of the United States, to wit: That by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the General Assembly of the State of Louisiana, No. 48, of the year 1877, excluding certain lands from all liability for drainage taxes and cancelling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the General Assembly of the State of Louisiana, No. 67, of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of act No. 20 of the General Assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the city of New Orleans or portions thereof and the collection of drainage-tax assessments are unconstitutional, null, and void because repugnant to the Constitution of the United States, especially section 10 of article 1 and the 14th amendment of that Constitution, prohibiting all State legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character; the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescription and *res judicata*, that while the case of Peake *vs.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope; in any event the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the de-

murrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata*.

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard; and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of the New Orleans Drainage Co., 11 An., 338; Marquez *vs.* City of New Orleans, 13 An., 319; Correjolles *vs.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *vs.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean *vs.* City of Bloomington, 106 Ill., 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under act No. 30, of 1871, and by no interpretation could be held to include warrants issued under the subsequent act No. 16, of 1876; that the said assessments against public property were not confirmed by act No. 30, of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi & Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to

which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876, or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States and the interpretation given them by the highest court of the State in question are binding as rules of decision in the Federal courts; that the laws of prescription of the State of *the* Louisiana and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute without further condition constitutes a complete defense; hence, even if the city, as erroneously held by your honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should have been maintained; that the case of Insurance Company *vs.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant, to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival, so that it is the warrant-holders, and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An., 1037; McKnight *vs.* Calhoun, 36 An., 408, to the effect that the prescription of debts due by a succession to its administrator and *vice versa* is suspended, while the administration continues, are without applica-

tion here; that whether or not the assessments as originally made, are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character; that the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code, the case of Reed *vs.* His Creditors, 39 An., 115, citing State *vs.* Jackson, 34 An., 178, and Davidson *vs.* Lindop, 36 An., 767, construing, as they do the particular provisions of special statutes presenting no feature in common with those presented here, the statutes interpreted by those cases, differing in toto from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue.

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the circuit court for the fifth circuit and eastern district of Louisiana, in the case of James W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed, in any event, the amount of its bond issue, described in the answer as a creditor in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer; the record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city, received, either himself personally or through his employees, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record; the bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence, was a diminution of the outstanding drainage fund; and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal conse-

quences of a certain act, against which the laws of Louisiana does not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake *vs.* New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage—that such an abandonment was no cause of liability to warrant-holders; that while the opinion was with reference to work of construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense, the court erred.

Fourteenth. That the court erred in holding that the city of New Orleans was a debtor of John G. Warner, the complainant, in the sum of six thousand dollars, with eight per cent. interest from January 6th, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warren Van Norden, transferee, to said city, under the authority of act 16 of the legislature of the State of Louisiana, approved February 24th, 1876.

Sixteenth. That the court erred in holding that the city in any mode, should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city, in any event, for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the General Assembly of the State of Louisiana, Nos. 48 and 67, of 1877, and section 40 of act No. 20, of 1882, were full and complete authority and justification of the city of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

That this assignment of errors, petitioner prays this court to take and consider as its assignment of errors, along with errors set out

in this petition, as an assignment of errors for the purposes of this petition.

35. The court was also in error in allowing interest at eight per cent. per annum upon the warrants sued upon from June 6th, 1876, making over twenty-two years, which would amount now to over one hundred and seventy-six per cent.; that neither act No. 16 of 1876, nor the contract of sale thereunder, provides for the payment of interest, and the stipulation for the payment of interest contained in the warrants was without authority of law, the administrators of accounts and finance having no power to exceed the statute, and the contract, under which the warrants were issued.

36. That whether or not the said plea of *res adjudicata* was well founded, is to be determined by the scope and effect of the finding and decision of this court in the said case of Peake *vs.* New Orleans; that the proper construction of your honors' decision in that case is a subject peculiarly within the supervisory power of this court; and that such power should be here exercised in the interest of jurisprudence and uniformity of decision, and as well also in furtherance of justice.

37. That the contract upon which is founded the liability sought to be established against the city, was grossly unfair and inequitable in reference to the latter; that the dredge-boats, derricks and other property, sold to the city in 1876 for three hundred thousand dollars, payable in drainage warrants, had been acquired by Van Norden from the canal company in 1872 for fifty thousand dollars; that during the intervening time, the boats and other drainage paraphernalia had been in almost constant use, and, from the averments of the bill as to the number of canals dug and levees built, it is evident that they were worked to their utmost capacity; that this in no sense tended to increase their value, as placed upon them by Van Norden and the canal company in the purchase from the latter by the former in 1872; that this, notwithstanding, the same property was sold to the city by Van Norden in 1876 for an amount in drainage warrants exceeding by five times the sum which he had paid for them nearly four years previously.

Your petitioner thus respectfully submits, that the questions involved in the determination of the controversy in this suit, are of such gravity and importance, and their treatment by the court of appeals was such, as justifies petitioner, in the furtherance of justice, to invoke the power of this court, that they may be authoritatively and finally adjudged upon, after a full presentation of the merits.

Wherefore, petitioner respectfully prays, that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the fifth circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said circuit court of appeals, in said case, therein entitled John G. Warner *vs.* City of New Orleans, No. 691, to the end that said case may be reviewed and determined by this court, as provided by section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and

to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decree of the said circuit court of appeals in said suit, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

UNITED STATES OF AMERICA, }
State of Louisiana, City of New Orleans. }

Walter C. Flower, being duly sworn, deposes and says: That he is the mayor of The City of New Orleans, defendant in the suit of John G. Warner *vs.* The City of New Orleans, No. 691 of the docket of the United States circuit court of appeals for the fifth circuit; that he has read the foregoing petition, and the facts therein stated are true to the best of his knowledge and belief.

UNITED STATES OF AMERICA, }
State of Louisiana, City of New Orleans. }

Samuel L. Gilmore, being duly sworn, deposes and says: That he is city attorney of the city of New Orleans; that as such he had personal charge for the said city of the case in the foregoing petition mentioned, in the United States circuit court of appeals for the fifth circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.

Office Supreme Court U. S. Filed Mar. 14, 1899. James H. McKenney, Clerk.

In the Supreme Court of the United States, October Term, 1899.

THE CITY OF NEW ORLEANS, Petitioner, }
vs. } No. 172.
JOHN G. WARNER. }

On writ of certiorari to the United States circuit court of appeals for the fifth circuit.

Assignment of Errors.

First. That the United States circuit court of appeals for the fifth circuit is and was without jurisdiction to hear and determine this cause; that the case involves the construction and application of the Constitution of the United States, especially section 10 of article 1, and also the fourteenth amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which

involves the construction or application of the Constitution of the United States.

That in this case certain laws of the State of Louisiana are claimed to be in contravention of the Constitution of the United States, to wit, that by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the General Assembly of the State of Louisiana, No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes and canceling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the General Assembly of the State of Louisiana, No. 67 of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of act No. 20 of the General Assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the city of New Orleans or portions thereof and the collection of drainage-tax assessments are unconstitutional, null, and void, because repugnant to the Constitution of the United States, especially section 10 of article 1 and the fourteenth amendment of that Constitution, prohibiting all State legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character, the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescription and *res judicata;* that while the case of Peake *vs.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope. In any event, the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata.*

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that the city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing

warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estopped it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard, and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of the New Orleans Drainage Co., 11 An., 338; Marquez *vs.* City of New Orleans, 13 An., 319; Correjolles *vs.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *vs.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean *vs.* City of Bloomington, 106 Ill., 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under act No. 30 of 1871, and by no interpretation could be held to include warrants issued under the subsequent act, No. 16 of 1876; that the said assessments against public property were not confirmed by act No. 30 of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876 or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property

and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States and the interpretation given them by the highest court of the State in question are binding as rules of decision in the Federal courts; that the laws of prescription of the State of Louisiana and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute, without further condition, constitutes a complete defense. Hence, even if the city, as erroneously held by your honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should have been maintained; that the case of Insurance Company *vs.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival; so that it is the warrant-holders and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An., 1037; McKnight *vs.* Calhoun, 36 An., 408, to the effect that the prescription of debts due by a succession to its administrator and *vice versa* is suspended, while the administration continues, are without application here; that whether or not the assessments as originally made are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character. That the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code the case of Reed *vs.* His Creditors, 39 An., 115, citing State *vs.* Jackson, 34 An., 178, and Davidson *vs.* Lindop, 36 An., 767, construing, as they do, the par-

ticular provisions of special statutes presenting no feature in common with those presented here; the statutes interpreted by those cases differing in toto from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue.

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the circuit court for the fifth circuit and eastern district of Louisiana in the case of James W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed in any event the amount of its bond issue, described in the answer as a credit in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer. The record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city, received, either himself personally or through his employés, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record. The bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence was a diminution of the outstanding drainage fund, and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the laws of Louisiana do*es* not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake *vs.* New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage; that such an abandonment was no cause of liability to

warrant-holders; that while the opinion was with reference to work or construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense the court erred.

Fourteenth. That the court erred in holding that the city of New Orleans was a debtor of John G. Warner, the complainant, in the sum of six thousand dollars, with eight per cent. interest, from January 6, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warren Van Norden, transferee, to said city, under the authority of act 16 of the legislature of the State of Louisiana, approved February 24, 1876.

Sixteenth. That the court erred in holding that the city in any mode should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city in any event for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the General Assembly of the State of Louisiana, Nos. 48 and 67 of 1877 and section 40 of act No. 20 of 1882, were full and complete authority and justification of the city of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

SAMUEL L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Petitioner.

Office Supreme Court U. S. Filed May 14, 1900. James H. McKenney, Clerk.

In the Supreme Court of the United States, October Term, 1900.

THE CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER, JOHN CROSSLEY'S SONS, THE SUFFOLK National Bank, Francis James Gasquet, Wilder & Company, Mrs. Frank N. Butler, in Her Individual Capacity as Widow in Community and as Executrix of the Last Will and Testament of Frank N. Butler, Her Deceased Husband; Mrs. Mary E. Taliafero, and Mrs. Eliza J. Lytle, Dative Tutrix, Respondents. } No. 281.

Petition for writ of certiorari requiring the United States court of appeals for the fifth circuit to certify to the Supreme Court of the United States for its review and determination the case of City of New Orleans, appellant, *vs.* John G. Warner *et als.*, appellees, No. 928, November term, 1899.

In the Supreme Court of the United States, October Term, 1899.

THE CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER, JOHN CROSSLEY'S SONS, THE SUFFOLK National Bank, Francis James Gasquet, Wilder & Company, Mrs. Frank N. Butler, in Her Individual Capacity as Widow in Community and as Executrix of the Last Will and Testament of Frank N. Butler, Her Deceased Husband; Mrs. Mary E. Taliafero, and Mrs. Eliza J. Lytle, Dative Tutrix, Respondents. } No. —.

Petition for writ of certiorari requiring the United States court of appeals for the fifth circuit to certify to the Supreme Court of the United States for its review and determination the case of City of New Orleans, appellant, *vs.* John G. Warner *et als.*, appellees, No. 928, November term, 1899.

To the honorable the Supreme Court of the United States:

The petition of the city of New Orleans, a municipal corporation, created by the act of the General Assembly of the State of Louisiana No. 45 of its session in 1896, respectfully shows:

That complainant, Warner, on November 26, 1894, filed his bill in the circuit court, setting forth in substance that he was the holder and owner of three warrants on the city of New Orleans, issued under a certain contract made June 6, 1876, for the purchase from the Mississippi and Mexican Gulf Ship Canal Company, and Van Norden, its transferree, of its rights, franchises, tools, implements, machines, boats and apparatus, the price whereof was to be paid in drainage warrants, payable out of drainage taxes, imposed under

various acts of the legislature set out in the bill; that the price of the sale was three hundred thousand dollars in such warrants. The bill further set up that the said contract of purchase was made under authority of act No. 16 of the General Assembly, of Louisiana, approved March 24, 1876, and that by the contract thereunder the city of New Orleans was to complete the system of drainage which had then been partially constructed by the said company and Van Norden, and to collect the drainage taxes which had been imposed to provide for the expense of establishing the system; that the city of New Orleans, from the date of its said purchase, ceased to do all work on said system, and never, thereafter, commenced or prosecuted any other, but sold some of the boats and machinery so purchased, diverted the proceeds of the drainage taxes to unauthorized purposes, and allowed others of the said boats to rot and sink, unused.

After charging other acts in violation of the city's contract of 1876, the bill concluded with a prayer for the taking of an account of all drainage taxes, assessments and judgments, imposed under certain named statutes, and of all moneys collected by the city on account of the same, as well as all payments, disbursements and dispositions thereof; for all loss, waste and damage caused by the city to the said assessments and judgments, by reason of her illegal and wrongful acts in violation of the duties and obligations imposed on her by said act of sale of June 6, 1876; and that the sum found to be due on said accounting, with interest, be decreed to be paid over to plaintiff, and other parties similarly situated, to the full extent of their warrants, with interest, and other germane relief.

To this bill the city filed a demurrer, general and special, under which it was claimed that she was entitled to plead, against any asserted liability on account of the warrants sued on, her issue in 1873 of $1,672,105.21 of bonds, to retire that amount of drainage warrants, on the ground that, that, if not a discharge of any and all liability by her to the drainage fund, was at least a payment of any sum for which she, herself, might be a debtor to that fund, on account of drainage assessments against streets, squares, public places, and other property of a like character; also that the decision of the Supreme Court, in the case of James W. Peake *vs.* City of New Orleans, 139 U. S., p. 342, was *res adjudicata* against complainant, as to all the matters and things set out in his bill.

The demurrer was sustained by the circuit court, and the cause being brought to the court of appeals for the fifth circuit, by appeal, it was by that court certified to the Supreme Court of the United States, to obtain its instructions as to the two points relied upon by the city, as above stated.

Warner *vs.* City of New Orleans, 167 U. S., 467 *et seq.*

The Supreme Court held, that the city could not plead her bond issue as a set-off or payment, as to any liability sought to be established by the bill; the second question it declined to answer.

See Warner *vs.* New Orleans, 167 U. S., 467 *et seq.*

Thereupon, after the filing of the mandate of the Supreme Court, the court of appeals overruled the demurrer, on the ground, besides

that furnished by the Supreme Court's opinion, that the case of Peake *vs.* New Orleans did not necessarily apply to the facts of this case, nor operate to defeat complainant's action.

See Warner *vs.* New Orleans, 81 Fed. Rep., 645.

The city having filed its answer in the circuit court, after the taking of evidence, the cause came on for a hearing, which resulted in a decree of the circuit court, dismissing the bill; from this decree an appeal was taken to the court of appeals, by which it was reversed and one entered in favor of complainant; the case was then carried by certiorari to the Supreme Court of the United States, which affirmed the judgment of the court of appeals.

See Warner *vs.* New Orleans, 175 U. S., 120.

Thereupon there was a reference to a special master, for the purpose of ascertaining the amount of drainage funds for which the city was liable under the last decree, and also what other persons, besides complainant, as holders of drainage warrants, were entitled to the benefits of the decree; the master reported that the city was liable for an amount somewhat in excess of two millions of dollars of drainage taxes, composed, in part, of assessments levied against private property, which she failed to collect, and also in part of drainage assessments levied against streets, public squares, public places, etc., of which she was found the debtor.

The master also reported that the following parties, holders of drainage warrants, of the same class and kind as those held by relator, should, in common with him, be paid the amounts represented by their said warrants, to wit:

1st. John Crossley & Son, 58 warrants, aggregating...	$149,000 00
2nd. Wilder & Co., 2 warrants, in judgment, aggregating	7,000 00
3rd. F. J. Gasquet, 6 warrants, aggregating.....	30,000 00
4th. The Suffolk national bank, of Boston, 6 warrants, aggregating	60,000 00
5th. Frank N. Butler and Mary E. Taliafero, 1 warrant, for	5,000 00
6th. John J. Donaldson, 1 warrant, for	2,000 00
7th. Mrs. Eliza J. Lyttle, dative tutrix, 3 warrants, for..	12,000 00

Said sums to bear interest at 8 per cent. per annum from June 7, 1876.

To this report defendant filed the following exceptions:

First. That there was error in charging defendant with liability for the whole of the uncollected assessments against private property, of property owned by private persons, because the evidence before master showed that all such taxes as could be, or were susceptible of collection, have been collected and paid over to the parties and purposes for which they were assessed.

Second. That the advantages of the decree under which the reference is made, extended only to such warrants as were issued in payment of the property purchased by the act before G. Le Gardeur,

notary public, of date June 7, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750, and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the circuit court of appeals and of the Supreme Court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden against the city of New Orleans; that of said warrants, besides those issued in settlement of said claim for damages, the sum of twenty thousand dollars was issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the city of New Orleans, prior to June 6, 1876, and applied to general-fund purposes, and hence, that as to those warrants, in any event, there could be no recovery or allowance made; that in any event, the decree in the suit of J. W. Peake *vs.* City of New Orleans, No. 11614, of the United States circuit court for the eastern district of Louisiana, in *res judicata*, in favor of this defendant.

That although there is no mark or sign upon any of the said warrants, which were issued in payment of the price of the property purchased, which were given in settlement of the claim for damages, and which were executed and delivered in payment for drainage work, which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payment of the price of the said property, and what were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution; first, for the payment of the price of the property purchased; next, to the settlement of the claim for damages, and lastly for the payment for work mentioned in said notarial act; that all of said warrants bear date June 6, 1876, the first one bearing the number 313, and run up to and inclusive of the number 402, as is shown by the statement of the said warrants themselves, offered in evidence.

That from an examination of the said warrants, and a comparison of their numbers, it will be seen that with the issuance of warrant No. 332 there had been reached an issue of $150,000, adding to which warrant 333 for $5,000, would make a total issue of $155,000, or a difference of $1,250 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

After hearing, these exceptions were overruled and a final decree entered, declaring the city a debtor to the drainage fund in the sum of $1,850,336.52, this being the amount, with interest, of the assessments against public property alone, no note being taken in the decree of the amount for which the master's report had found a liability for the assessments on private property; drainage warrants held by complainant, and other intervening warrant-holders, to the extent of $271,000, with interest thereon at 6 per cent. per annum, from

June 6, 1876, amounting in all to about $791,000, were decreed to be payable out of the fund so established.

From this decree the city took an appeal to the court of appeals.

The assignment of errors for said appeal, sets up the same grounds appearing in the exceptions to the master's report.

The first one sets out that the court erred in overruling, and refusing to sustain the exceptions; that the same should have been maintained, and that there should have been a decree in favor of respondent; the other six assignments, set out in detail, the specific errors in the court's finding, and the special grounds relied upon for a reversal.

That on April 30th, 1900, the said court of appeals, for the fifth circuit, entered a decree, affirming that of the circuit court, for the reasons that all the issues raised in the circuit court, and upon the appeal from its decree, had been decided and foreclosed against the city of New Orleans by the Supreme Court of the United States, by its decree in Warner *vs.* City of New Orleans, 167 U. S., p. 467, and City of New Orleans *vs.* Warner, 175 U. S., p. 120.

That in the said circuit court, at the same time that petitioner applied for and obtained its order of appeal, it filed, in connection with its motion therefore, the following assignment of errors:

First. That the court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this court on the — day of March, 1900; that the court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second. That from the evidence before the court, accompanying the said report, it conclusively appeared that the dredge-boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the city of New Orleans from Warner Van Norden and the Mexican Gulf and Ship Canal Company, by authentic act before G. Le Gardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750.00, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the city of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third. That as to the $20,000.00 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the city of New Orleans to other than drainage-fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of the court of appeals, or of the Supreme Court of the United States, in this cause, that the circuit

court erred in admitting them to any participation in the fund ascertained by the master to be due by the city of New Orleans, or to their payment out of the same.

Fourth. That as to the remainder of the $320,000.00 issued, as shown by the said act of sale from Van Norden and said company to the city of New Orleans, that is, the residue after deducting the said $153,750.00, the value of the dredge-boats, etc., and $20,000.00, in satisfaction of drainage taxes claimed to have been diverted, to wit: $146,250.00, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the city of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work, by the city of New Orleans, required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750.00, while, as a matter of fact, the whole amount of the $320,000.00 of warrants issued by the city *were* decreed to be payable out of the said funds, save $4,000.00 thereof, which has been paid, in which finding the court was in error.

Fifth. That warrants to the extent only of $153,750.00 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth. That the court, refusing to separate the valid from the

illegal warrants, dealt with the entire issue on a unit, in which there was error; that the court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750.00, ascertained as aforesaid.

Seventh. That the court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decrees of this cause, made and entered by this court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been considered by this court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either court; that the circuit court erred in so holding, and should have held the reverse.

That petitioner also incorporated the said assignments of error in its application for a rehearing made herein to the said circuit court of appeals.

That in the opinion and decree of the said circuit court of appeals there was error to the prejudice of petitioner in the following particulars, to wit:

First. That the grounds of exception to the master's report filed by petitioner in the circuit court, and the issues raised by such exceptions, had not been decided adversely to the city of New Orleans, or foreclosed against her, in Warner *vs.* New Orleans, 167 U. S., p. 467, and New Orleans *vs.* Warner, 175 U. S., p. 120; and that the court of appeals erred in holding the reverse; that, on the contrary, no such questions were raised, much less decided, in the case first mentioned, and that in the cause secondly mentioned, although some of the issues presented by said exceptions were urged upon the court, the latter, by its opinion, expressly declined to consider them; and, further, the precise issues presented herein were not made, much less passed upon, by the Supreme Court, in the case secondly mentioned.

Second. That the principle declared by the two said cases was that the drainage warrants in question here, so far as issued in payment of the price of property, were obligations of the city of New Orleans; that the Supreme Court did not decide, in either of said cases, that warrants issued in settlement of, or attributable to, the payment of any claim for damages held by the Mississippi and Mexican Gulf Ship Canal Company or Warner Van Norden against the city of New Orleans, were obligations of the latter, or entitled to the same rights and privileges as warrants issued in payment of the price of property; that the court of appeals for the fifth circuit erred in not so holding, and also in holding as it did.

Third. That no warrants should be considered as having been issued in payment of the price of the franchise of the said company, as the same was of no value to the city of New Orleans, and its acquisition by the latter gave it nothing of any value, but was, on the contrary, the assumption by it of an onerous burden, to wit: the completion of the drainage work at its own expense, for which work the company and Van Norden were entitled to charge fifty cents per square yard for canal excavation and levee building, which charges,

however, they had never been able to collect, except in an insignificant amount, thus throwing upon the company and Van Norden the loss of many hundreds of thousands of dollars; thus relieving them of a burdensome and unprofitable duty, and the court of appeals erred in holding that the contrary held by the Supreme Court, as that the said franchise was to be considered, as in part, a consideration for any of said warrants.

Fourth. That the item of twenty thousand dollars of drainage warrants, issued in settlement of the amount of drainage taxes said to have been diverted or used by the city of New Orleans for purposes other than the retirement of drainage warrants, prior to June 7th, 1876, the date of the city's purchase, was in reality entirely beyond the authority given the city by act No. 16 of 1876, and the substitution of so many so-called "purchase" warrants for a corresponding amount of warrants issued to Van Norden and the said company, in payment for work done, which latter class of warrants it was decreed that the city could not be compelled to pay, in the case of J. W. Peake *vs.* City of New Orleans, No. — of the docket of this court of its October term of 1890.

Fifth. That the said court erred in not sustaining the assignment of errors upon which the reversal of the decree of the circuit court was asked, which said assignment of errors was as follows, to wit:

First. That the court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this court on the — day of March, 1900; that the court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second. That from the evidence before the court, accompanying the said report, it conclusively appeared that the dredge-boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the city of New Orleans from Warner Van Norden and the Mexican Gulf and Ship Canal Company, by authentic act before G. Le Gardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750.00, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the city of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment of, or participation in, the said fund, because they were in no sense "purchase" warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third. That as to the $20,000.00 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the city of New Orleans to other than drainage-fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of

the findings of this court, or of the Supreme Court of the United States, in this cause; that the circuit court erred in admitting them to any participation in the fund ascertained by the master to be due by the city of New Orleans, or to their payment out of the same.

Fourth. That as to the remainder of the $320,000.00 issued, as shown by the said act of sale from Van Norden and said company to the city of New Orleans, that is, the residue after deducting the said $153,750.00, the value of the dredge-boats, etc., and $20,000.00 in satisfaction of drainage taxes claimed to have been diverted, to wit: $146,250.00, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the city of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work by the city of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that, in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750.00, while, as a matter of fact, the whole amount of the $320,000.00 of warrants issued by the city *were* decreed to be payable out of the said funds, save $4,000.00 thereof, which had been paid, in which finding the court was in error.

Fifth. That warrants to the extent only of $153,750.00 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth. That the court, refusing to separate the valid from the

illegal warrants, dealt with the entire issue as a unit, in which there was error; that the court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750.00, ascertained as aforesaid.

Seventh. That the court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decrees in this cause, made and entered by this court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been considered by this court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either court; that the circuit court erred in so holding, and should have held the reverse.

Your petitioner thus respectfully submits that the questions involved in the determination of the controversy in this suit, are of such gravity and importance, and their treatment by the court of appeals was such, as justifies petitioner, in the furtherance of justice, to invoke the power of this court, that they may be authoritatively and finally adjudged upon, after a full presentation of the merits.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the fifth circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said circuit court of appeals, in said case, therein entitled City of New Orleans *vs.* John G. Warner *et als.*, No. 928, to the end that said case may be reviewed and determined by this court, as provided by section 6 of the act of Congress entitled, "An act to establish circuit courts of appeals, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3rd, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decree of the said circuit court of appeals in said suit, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans.

Paul Capdievielle, being duly sworn, deposes and says: That he is the mayor of The City of New Orleans, plaintiff in the suit of City of New Orleans *vs.* John G. Warner *et als.*, No. 928 of the docket of the United States circuit court of appeals for the fifth circuit; that he has read the foregoing petition, and the facts therein stated are true to the best of his knowledge and belief.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans.

Samuel L. Gilmore, being duly sworn, deposes and says: That he is city attorney of the city of New Orleans; that as such he had

personal charge for the said city of the case in the foregoing petition mentioned, in the United States circuit court of appeals, for the fifth circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.

Office Supreme Court U. S. Filed May 14, 1900. James H. McKenney, Clerk.

United States Supreme Court, October Term, 1900.

CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER ET ALS., Respondents. } No. 281.

On application for writ of certiorari.

Answer of Respondent.

Richard De Gray, J. D. Rouse, William Grant, solicitors for respondents.

United States Supreme Court, October Term, 1899.

CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER ET ALS., Respondents. } No. —.

Now comes the respondents in the above-entitled proceeding, and for answer to the petition of the city of New Orleans praying for a writ of certiorari, say:

I.

That the statement of the proceedings had in the suit of John G. Warner *et als. versus* The City of New Orleans, in the circuit court of the United States for the eastern district of Louisiana, and in the United States circuit court of appeals, as set forth in said petition, is substantially true, save and except that the said petitioner has omitted to state the fact that the appeal of the city from the said decree of the circuit court in favor of these respondents, dated March 26, 1900, was allowed, and taken to the said court of appeals, without a supersedeas, as appears from the order of the circuit court granting said appeal (present Record, p. 68); the said City of New Orleans having given bond for costs only, but without any stipulation securing the amount of said decree, as required by law, to suspend execution. And so respondents submit that if a writ of certiorari is granted herein, it should be expressly provided that the granting of the writ shall not operate to suspend or delay the execution of the said decree of March 26, 1900, unless the said petitioner shall give security for the principal and interest due respondents under said decree, now amounting to the sum of, say $791,000.

II.

These respondents deny that the master erred in allowing the claims of the holders of the warrants issued under the agreement of sale and compromise made between the city of New Orleans and the Mexican Gulf Ship Island Canal Company and Warner Van Norden, transferee, all of said warrants being of the same kind and class, and issued upon the same consideration as those held by John G. Warner, complainant, in the original suit; and they deny that the circuit court erred in overruling the exceptions to the master's report and in making the decree of March 26, 1900, or that the United States circuit court of appeals erred in affirming said decree. And respondents specially aver that in allowing the claims of the warrant-holders, the master strictly followed, as it was his duty to do, the requirements of the decree of December 5, 1898, as affirmed by this honorable court in the case of The City of New Orleans *vs.* John G. Warner, 175 U. S., 120; 176 U. S., p. 92.

III.

Respondents further submit that the city of New Orleans having been fully heard upon all the numerous defenses set up in its answer to the original bill of the said Warner, filed in behalf of himself and your respondents, holding the same class of warrants, should not now be permitted to set up other and further defenses before the master, impeaching the decree of December 5, 1898, affirmed by this court, under which the master proceeded. Respondents are advised, in this connection, that neither the master, nor the circuit court, nor the court of appeals, could lawfully disregard the decision of this court, and deny to warrant-holders the right to claim the benefit of said decree. And they further suggest that, according to settled practice and usage, this court will not itself review, reverse, or modify its own decrees upon a second appeal.

Wherefore respondents pray that the application of the petitioner, The City of New Orleans, for a writ of certiorari be denied, with costs; but that in case this honorable court is pleased to allow said writ, it be expressly ordered that the allowance shall not suspend the execution of the decree sought to be reviewed, unless the petitioner shall give security for the amount due respondents thereunder, in principal and interest, now amounting to $791,000.

Respectfully submitted.

R. DE GRAY,
J. D. ROUSE,
WM. GRANT,
Solicitors for Respondents.

William Grant, being duly sworn, says that he is one of the solicitors for the respondents in this cause, and that the statements contained in the foregoing answer are true, to his own knowledge.

WM. GRANT.

Subscribed and sworn to before me this — day of May, 1900.

——, ——,
Notary Public.

Office Supreme Court U. S. Filed May 14, 1900. James H. McKenney, Clerk.

United States Supreme Court, October Term, 1900.

THE CITY OF NEW ORLEANS, Petitioner,
versus
JOHN G. WARNER ET ALS., Respondents. } No. 281.

On petition for certiorari to United States circuit court of appeals for the fifth circuit.

Caption.

UNITED STATES OF AMERICA,
Fifth Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth judicial circuit, begun on the third Monday of November, 1899, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David Shelby, United States circuit judges for the fifth judicial circuit.

THE CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees.

Be it remembered that heretofore to wit, on the 7th day of April, 1900, a transcript of the record from the circuit court of the United States for the eastern district of Louisiana, was filed in the office of the clerk of the United States circuit court of appeals, for the fifth circuit, in the words and figures following, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER ET ALS., Appellees,
versus
THE CITY OF NEW ORLEANS, Appellant. } No. 12350.

Richard De Gray, Esquire, and Rouse & Grant, Esquires, for appellees.

Samuel L. Gilmore, Esquire, city attorney, and Branch K. Miller, Esquire, for appellant.

Appeal from decree on exceptions to master's report on claims of warrant-holders.

Appeal from the circuit court of the United States in and for the fifth circuit and eastern district of Louisiana to the United States circuit court of appeals for the fifth circuit, returnable within thirty (30) days from the sixth (6th) day of April, A. D. one thousand-nine hundred, at the city of New Orleans, State of Louisiana.

Transcript of Appeal.

Motion to file mandate of U. S. circuit court of appeals and to enter judgment in accordance therewith and appointment of master.

Entered and filed December 5, 1898.

United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray and Rouse & Grant, solicitors for complainant in the above-entitled cause and upon their suggesting that the final decree rendered herein by this hon. court on the 8th day of March, 1898, has been reversed by the United States circuit court of appeals for the fifth circuit, as will more fully appear by the mandate of said court presented herewith.

It is now ordered that said mandate be filed, and in accordance with the directions therein contained that the decree of this hon. court of said 8th day of March, 1898, in favor of the defendant, The City of New Orleans, and dismissing complainant's suit with costs, be now annulled and set aside with all costs of this suit, and in accordance with said mandate it is now further ordered, adjudged and decreed as follows, to wit:

1. It is decreed that the city of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6, 1876, as stipulated in the warrants sued on,

and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be and the same are hereby declared to constitute a trust fund in the hands of the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of the State of Louisiana approved February 24, 1876.

3. That it be referred to A. G. Brice, Esq., one of the masters of the court, to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments by any person having possession thereof and to examine witnesses touching all such matters.

In taking and stating said account said master is directed to charge the defendant as well with the amount of drainage assessments against the city on the areas of the streets, squares, and public places as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice, by advertisement in a newspaper published in the city of New Orleans, to holders of warrants issued as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant-holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions or to obtain special leave from the court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

5. It is further decreed that upon the coming in of the master's report and its confirmation the complainant and all those who have established their claims under the fourth clause of this decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full then for the proper *pro rata* thereof, and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary from time to time to carry this decree into full effect, and that the defendant pay all costs of this suit.

(Signed) ALECK BOARMAN, *Judge.*

New Orleans, Dec. 5, 1898.

Mandate filed December 5, 1898.

UNITED STATES OF AMERICA *ss.*:

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Louisiana, Greeting:

Whereas, lately in the circuit court of the United States for the eastern district of Louisiana, before you, or some of you, in a cause between John G. Warner, complainant, and The City of New Orleans, respondent, wherein a decree was rendered on the 8th day of March, 1898, as follows, to wit:

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350. In Equity.

"The cause came on to be heard at this term upon the bill, amended bill, exhibits, answer, replication, proofs and testimony, and was argued by the solicitors for the respective parties and submitted, when the court took the same under consideration:

"Whereupon and on consideration thereof, and for reasons orally assigned, it is ordered, adjudged and decreed that there be judgment in favor of the defendant, The City of New Orleans, dismissing this suit with costs.

"(Signed) CHARLES PARLANGE, *Judge.*

"March 8, 1898."

as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the fifth circuit by virtue of an appeal sued out by said John G. Warner agreeably to the act of Congress in such case made and provided, fully and at large appears:

And whereas, in the present term of November, in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said United States circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be and the same is hereby reversed and this cause remanded to said circuit court with instructions to enter a decree as follows, to wit:

"1. It is decreed that the City of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6th, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be, and the same are hereby declared to constitute a trust fund in the hands of

the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city, under authority of the act No. 16 of the legislature of the State of Louisiana, approved February 24, 1876.

3. That it be referred to one of the masters of the court to take and state an am-ount of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments, by any person having possession thereof, and to examine witnesses touching all such matters.

In taking and stating said account the master is directed to charge the defendant as well with the amount of drainage assessments against the city on the area of the streets, squares, and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice by advertisement in a newspaper published in the city of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant-holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions, or to obtain special leave of the court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

5. It is further decreed that upon the coming in of the master's report and its confirmation, the complainant and all those who have established their claims under the fourth clause of this decree, will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then the proper *pro rata* thereof, and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary, from time to time, to carry this decree into full effect, and that the defendant pay all costs of this suit.

It is further decreed that the defendant The City of New Orleans be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court."

May 17, 1898.

You, therefore, are hereby commanded that such further proceedings be had in said cause in accordance with the decree of this court and as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the fifth day of December in the year of our Lord one thousand eight hundred and ninety-eight.

(Signed) J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Clerk's costs due $5.70.

(Endorsed:) No. 12350. United States circuit court of appeals for the fifth circuit. No. 691. November term, 1897. John G. Warner, appellant, *vs.* The City of New Orleans, appellee. Mandate filed Dec. 5, 1898. H. J. Carter, d'y clerk.

Motion and Order Making Parties.

Filed Jan. 16th, 1900.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray, and Rouse & Grant, solicitors for Ann Warner, Joanna E. McCrossin, Mary E. Warner and Harry Warner, sole heirs-at-law of John G. Warner, deceased, complainant in the above entitled and numbered suit, and on suggesting to the court that said John G. Warner departed this life on the 21st day of March, 1899, that his succession has since been duly opened in the civil district court for the parish of Orleans and the movers herein have been duly recognized as his heirs-at-law and put in possession of his property in Louisiana, as will more fully appear from the duly certified copy of the decree of said court herewith presented and made part hereof:

It is ordered by this court that said Ann Warner, Joanna E. McCrossin, Mary E. Warner and Harry Warner be made parties plaintiff herein, and that this suit and all the proceedings herein stand revived in their names and be in the same plight and condition as the same stood at the time of the death of said John G. Warner.

No objection to the entry of the above.

(Signed) SAM'L L. GILMORE, *City Att'y.*
BRANCH K. MILLER,
Solicitor for Defendant.

Copy of Judgment of Civil District Court.

Filed Jan 16th, 1900.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I hereby certify that on the 27th day of December, 1899, judgment was rendered in this court in the following-entitled suit in the words and figures following, to wit:

Division "C."

Succession of JOHN G. WARNER. No. 61015.

Judgment.

On petition of widow and sole heirs to be recognized and put in possession.

The court being satisfied from the evidence adduced and the law applicable to the case, that the petitioners are entitled to the relief prayed for,

It is ordered, adjudged and decreed that Ann Warner, widow of John G. Warner, be and she is hereby recognized as the widow, and as such entitled to and put in possession in her own right of one-third ($\frac{1}{3}$) of all the personal property and movables left by said decedent.

It is further ordered, adjudged and decreed that Joanna E. McCrossin, Mary E. Warner and Harry Warner, be and they are hereby recognized as the sole heirs of John G. Warner, deceased, and as such entitled to and put in possession of the remaining two-thirds ($\frac{2}{3}$) of said property in equal proportions. All under the statute and jurisprudence of the State of New York.

Judgment rendered and signed in open court December 27th, 1899.

(Signed) JOHN ST. PAUL, *Judge.*

In testimony whereof I have hereunto set my name and affixed the seal of the said court, at the city of New Orleans, this 27th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] (Signed) F. E. PETERSON,
Deputy Clerk.

(Endorsed on back:) No. 61015. Civil district court. Succession of John G. Warner. Copy of judgment.

Motion to File and Record Mandate of the U. S. Supreme Court, &c.

Filed February 19th, 1900.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, JOANNA E. McCrossin, Mary E. Warner, and Harry Warner, Substituted,

vs.

THE CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard de Gray and Rouse & Grant solicitors for complainants, and on suggesting to the court that since the filing of the mandate of the United States circuit court of appeals for the fifth circuit herein, on the 5th day of December, 1898, and the entry

of the judgment and decree based thereon, under which the case was referred to A. G. Brice, Esq., master in chancery to examine and report pursuant to said decree, this cause was removed to the Supreme Court of the United States on writ of certiorari, where, after due proceedings, the decree of said United States circuit court of appeals was affirmed with costs, on the 15th day of January, 1900, as per the mandate of said Supreme Court now presented.

It is ordered that said mandate be now filed and that the decree of the Supreme Court therein contained in the words and figures following, be recorded, to wit:

"It is now hereby ordered, adjudged and decreed by this court that the decree of the said United States circuit court of appeals in this cause be, and the same is hereby, affirmed with costs; and that the said appellant, John G. Warner, recover against the said appellee for his costs herein expended and have execution therefor.

"And it is further ordered that this cause be, and the same is hereby remanded to the circuit court of the United States for the eastern district of Louisiana with a direction to comply with the decree of the circuit court of appeals."

And it is now ordered by this court that the master herein proceed forthwith with his accounting and report in accordance with the decree herein entered on said 5th day of December, 1898, pursuant to the decree of said United States circuit court of appeals, affirmed as aforesaid, with a direction to this honorable court to comply therewith.

Signed as of date February 19, 1900, *nunc pro tunc*.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Feb. 20, 1900.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

Mandate of Supreme Court of the United States.

Filed Feb. 19, 1900.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Louisiana, Greeting:

Whereas, lately in the United States circuit court of appeals for the fifth circuit, in a cause between John G. Warner, appellant, and The City of New Orleans, appellee, wherein the decree of the said circuit court of appeals, entered in said cause on the 7th day of May, A. D. 1898, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel. On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be and the same is

hereby, reversed and this cause remanded to said circuit court with instructions to enter a decree as follows, to wit:

"1. It is decreed that the city of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6, 1876, as stipulated in the warrants sued on and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares and other public places as well — those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of the State of Louisiana approved February 24, 1876.

3. That it be referred to one of the masters of the court to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments by any person having possession thereof and to examine witnesses touching all such matters.

In taking and stating said account the master is directed to charge the defendant as well with the amount of drainage assessment against the city on the areas of the streets, squares, and public places as with those against the owners of private property with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice, by advertisement in a newspaper published in the city of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant-holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions or to obtain special leave of the court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

It is further decreed that upon the coming in of the master's report and its confirmation the complainant and all those who have established their claims under the fourth clause of this decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then for the proper *pro rata* thereof and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary from time to time to carry this

decree into full effect, and that the defendant pay all costs of this suit.

It is further decreed that the defendant, The City of New Orleans be condemned to pay the costs of this cause in this court for which execution may be issued out of said circuit court," as by the inspection of the transcript of the record of the said United States circuit court of appeals, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said United States circuit court of appeals in this cause be, and the same is hereby affirmed with costs; and that the said appellant, John G. Warner, recover against the said appellee for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the circuit court of the United States for the eastern district of Louisiana with a direction to comply with the decree of the circuit court of appeals.

It is further ordered that this decree be entered *nunc pro tunc* as of March 13th, 1899.

January 15, 1900.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari, notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of February, in the year of our Lord one thousand nine hundred.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed on back: No. 12350. Supreme Court of the United States. No. 172, October term, 1899. The City of New Orleans *vs.* John G. Warner. Mandate.

Master's Report, Exceptions Thereto, and Master's Supplemental Report.

Filed March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Master's Report.

To the honorable the judges of the circuit court of the United States for the eastern district of Louisiana:

Pursuant to the decretal order of reference entered in the above-entitled cause by this honorable court on the 5th day of December, 1898, I respectfully report that the notice required to be made by said order was given to holders of all drainage warrants of the same class and kind as those held by the complainant, as set forth in his bill, by publishing the same in the Times-Democrat, a newspaper of general circulation, printed in the city of New Orleans, daily, for a period of thirty consecutive days, the first publication having been made on the 6th day of December, 1898, and the last on the 5th day of January, 1899.

In response to said notice, the following parties presented and filed with me on the 10th and 15th of December, 1898, and the 6th of January, 1899, claims on drainage warrants of the same date, *from* class and kind as those held by the complainant as follows:

1st.	John Crossley & Son, 58 warrants, aggregating.....	$149,000 00
2nd.	Wilder & Co., 2 warrants in judgment, aggregating	7,000 00
3rd.	F. J. Gasquet, 6 warrants, aggregating.....	30,000 00
4th.	The Suffolk Nat. Bank of Boston, 6 warrants, aggregating	60,000 00
5th.	Frank N. Butler and Mary E. Taliaferro, 1 warrant for.....	5,000 00
6th.	John J. Donaldson, 1 warrant for.....	2,000 00
7th.	Mrs. Eliza J. Lyttle, dative tutor, 3 warrants for..	12,000 00
8th	John G. Warner, complainant, 3 warrants, aggregating.....	6,000 00
9th.	James Jackson, 8 warrants, aggregating.....	45,000 00

The serial numbers of said warrants, and their dates and respective amounts are set forth in detail in the several claims in writing filed before me by said parties, which claims, together with the warrants held by them respectively are herewith returned into court, with this report, as part thereof.

The hearing of said reference was opened in my office in room No. 901 Hennen building, in the city of New Orleans, upon notice to all parties in interest, who attended by their respective counsel on the 10th, 15th and 16th of December, 1899, and on the 3d and

6th days of January, 1899, respectively, at 3 o'clock p. m., as will appear by reference to the procès verbal hereto annexed and marked Exhibit "A," which contains a record of all the proceedings had before me, and includes all the evidence taken and proofs submitted on the reference from the date the hearing was opened, until the 6th day of January, 1899, when further proceedings were suspended by the writ of certiorari removing the cause to the Supreme Court of the United States, for the purpose of a review of the decree, as well as the proceedings had and proofs taken since. Subsequently the decretal order of this court dated February 19th, 1900, directing me to proceed with the hearing under the original order, having been delivered to me, I gave notice to all parties in interest that I would proceed with the reference at my office on the 21st of February, 1900, at 3.30 p. m., at which hour the complainant and the claimants appeared by their counsel, Richard de Gray and Rouse & Grant, and the defendant by its counsel, Branch K. Miller, Esq. Here the claim of Frank N. Butler and Mary Taliaferro was amended and supplemented by admitting Mrs. Frank N. Butler as a claimant in her capacity of widow in community and testamentary executrix of the last will and testament of said Frank N. Butler, her lately deceased husband who had departed this life since the filing of said original claim, and her written appearance together with a certified copy of her letters testamentary are herewith transmitted to the court with this report.

Further evidence was also taken and introduced by the claimants and city touching the matters at issue, all of which is contained in said procès verbal as now supplemented and returned into court.

And here all parties in interest by their counsel having declared that they had no further proofs to submit, the hearing was closed and the case was fixed for argument, and was argued and finally submitted on the 27th day of February, 1900.

And now upon a final consideration of the evidence and the arguments of counsel, I respectfully report to the court my findings of fact and conclusions of law, as directed by said orders of reference.

First.

I find, from all the evidence, and particularly from the depositions of S. D. Moody and Robert Shortridge, contained in said procès verbal of the proceedings before me, that the several drainage warrants presented to me by the several claimants aforesaid, were each issued to Warner Van Norden, transferree of the Mexican Gulf Ship Canal Company, by the defendant, The City of New Orleans, in payment of the consideration of the agreement and contract of sale between himself and said city by act before Gustave Le Gardeur, notary public, dated June 7, 1876, as in said act specified, pursuant to the authority of the act of the legislature of Louisiana, No. 16, dated February 24, 1876, as set forth in the complainant's bill; that said warrants were all presented to the administrator of finance of the city of New Orleans on the day of the date of said warrants, for payment, and that the fact of their presentation was endorsed by

said administrator on each of said warrants, as appears from such endorsements thereon.

I further find that none of said warrants have been paid, either in whole or in part, and that by reason of said presentation the defendant has become liable to pay eight (8) per cent. interest per annum thereon from June 6, 1876, until the same are paid.

I further find that each of said warrants were endorsed in blank by Warner Van Norden, transferee, to whose order they were made payable, and delivered to the said claimants, or to other parties through whom they have acquired title; and that the said Van Norden has since, by a written agreement dated October 20th, 1894, which was filed in this cause as an exhibit to the bill and has been offered in evidence before me, formally transferred to the complainant and to all holders of warrants who might intervene in this cause any and all interests he ever had in said warrants, and subrogated them to all his rights of action and remedies against the defendant appertaining to the same. And the said claimants having made satisfactory proof of their claims, I find that they are entitled to be paid the principal and interest due on the warrants held by them respectively out of the drainage assessments and taxes established as a trust fund for their payment by the said decree of December 5, 1898, and that they are entitled in all respects to the same relief as the complainant is under said decree.

And I further find from the proofs submitted to me, that the claimant-, Wilder & Co., are entitled to be paid the sum of $215.35 for their costs in their suit at law against the City of New Orleans, wherein they recovered judgment on their warrants in the circuit court of the United States for the eastern district of Louisiana, with costs, as appears from said judgment and the clerk's taxation of costs filed with their claim.

Second.

I further find from the averments of the complainant's bill, confessed by the defendant in its answer, and from the exhibits annexed to said bill, and the evidence of Clark Steen, an expert accountant who has examined the drainage assessment-rolls, and the judgment thereon:

1st. That the drainage assessments against the defendant, The City of New Orleans, for drainage taxes on the area of streets, squares and other public places, ou-standing and unpaid, for which the defendant has been decreed to account, after deducting all credits claimed by it, to which it is entitled under the decree,

amounts in principal to	$691,612.73
In statutory interest computed, as per Schedule No. 1, to December 5th, 1898	1,106,852.84
In statutory interest from December 5, 1898, to March 5, 1900	51,870.95
Total	$1,850,336.52

2nd. That the drainage assessments against private persons and property in the several drainage districts of the city of New Orleans

outstanding and uncollected, for which the defendant is accountable, after deducting all credits claimed by defendant, to which it is entitled under the decree of reference, amounts in principal to..... $724,941.54

In statutory interest from March 21, 1874, to December 5, 1898..... 1,075,329.95

In statutory interest from December 5, 1898, to March 5, 1900..... 54,370.61

Total..... $1,854,642.10

To arrive at these figures as to the amount due the drainage fund, at the present request of counsel for the defendant as well as counsel for the complainant and the claimants, Mr. Clark Steen, an expert accountant, familiar with the records of the city, was accepted to assist me. As a result of his work, he submitted, before these proceedings were suspended by the writ of certiorari heretofore referred to, Schedules No. 1 and No. 2, which contain statements of the whole amount of drainage taxes assessed against the city and private persons, with a computation of the statutory interest due thereon up to December 5th, 1898. I have accepted his statements as the basis of these findings, adding, myself, the interest which has accrued since that date to the present time. I would state, in this connection that, by consent of all parties, interest has been computed on all the tax judgments for convenience from March 21, 1874, as a common date, although many of the judgments are of an earlier date, the complainant and warrant-holders being satisfied that the computation will produce a sufficient fund to satisfy their claims.

Third.

I further find that all the drainage warrants issued under the agreement and contract of sale dated June 7, 1876, except $4,000, have been presented and proved before me; and that if all had been presented and proved there would be due thereon, in principal and interest, the sum of $928,000.00; and I further find that the amount due by the city, whether for taxes assessed against it, or for those assessed against private persons, as stated in my 3d finding, is more than sufficient to pay said sum. As a conclusion of law, therefore, I find that the complainant and the several claimants and holders of drainage warrants, including James Jackson, if his claim is not barred by the decree in the Peake case, are entitled to absolute decrees against the defendant for the amounts due them with costs.

Fourth.

These findings apply to all the warrant-holders, including James Jackson, who will be entitled to the same relief as the complainant and others, unless he is barred of relief by the decree in the case of James W. Peake *vs.* The City of New Orleans, No. 11614 on the docket of this court, as to whose claim I shall make a separate and

special finding as to the effect of that decree, counsel for all parties having requested me to do so March 5, 1900.

(Signed) A. G. BRICE, *Master.*

Supplemental Report on Defendant's Exceptions.

The objection to the validity of $20,000 of the warrants proved before me was not suggested by the defendant at the hearing, but is now made for the first time in its exceptions to the foregoing report. It appears, and I so find, that the city issued warrants Nos. 313 to 392, inclusive, in discharge of the consideration of the agreement of sale passed before Le Gardeur, notary public, amounting to $300,000, and also issued warrants Nos. 392 to 402, inclusive, aggregating $20,000, not for work but as a compromise of drainage taxes collected and misappropriated, as stated in the said act. Of the latter Crossley and Son are the holders of warrants Nos. 393 to 397, inclusive, for $2,000 each, amounting to $10,000; Mrs. Lyttle is the holder of warrant No. 398 for $2,000; John J. Donaldson is the holder of warrant No. 402 for $2,000, which is included in their judgment. Warrants 400 and 401 for $2,000 each have not been presented or proved, and appear to have been paid.

As act of February 24, 1876, section 1, specially authorized the city to transact or compromise with the transferee of the Mexican Gulf Ship Canal Company for the purchase and settlement of "all or any rights, franchises and privileges created, authorized or arising in favor of said company, or said transferee, under and by virtue of act 30 of 1871; also for the purchase and transfer of all tools, implements, machines, boats and apparatus belonging to said company, or its transferees," &c., I have no doubt but that the city, by the first clause of said act, was given plenary power to compromise and settle any claim the company or its transferee, had against the city arising out of the execution of the work under the provisions of the act of 1871, including claims based on work warrants, or on account of the diversion of drainage taxes, for which they were in fact given.

The claim of Wilder and Co. is upon a different footing. It is based on a judgment at law recovered by them in this court on two warrants, one for $5,000—part of the $300,000 of warrants issued for the purchase price of the sale, and one, No. 402, for $2,000—part of the $20,000 of compromise warrants, which judgment is final, and constitutes *res judicata*. The liability of the defendant was expressly determined by the U. C. circuit court of appeals in Wilder *v.* City of New Orleans, 87 F. R., 843, and is no longer open to examination.

Another objection, not made before me at the hearing by the defendant, now set up as an exception to the report, is that the act of February 24, 1876, did not authorize the city to compromise or settle claims for damages due the transferee of the Mexican Gulf Ship Canal Company, and that all warrants issued in excess of $153,750, the appraised value of the drainage plant, are void. I think the

exception is clearly unfounded. The first section of that act quoted above authorized the city to transact and contract for the purchase and settlement of all or any rights arising in favor of the canal company, or its transferee, under the act of 1871, as well as to purchase the dredge-boats and other property of the company. The word "transact" means, in the jurisprudence of this State, and is equivalent to, the word "compromise" (C. C. 3071), and it may be assumed that it was used by the legislature in this sense. The statute was an express legislative mandate, authorizing the city to compromise all claims growing out of a particular transaction without any litigation whatever and to pay the amount agreed upon in warrants. A mandate from one private person to another in the same words would comply with the requirements of the Civil Code in the respect (C. C., 2997; 40 A., 234). It seems clear, therefore, that the statute conferred upon the city the fullest power to settle and pay all claims for damages, even if they were the sole consideration for the warrants. But the city was authorized to purchase the franchise of the canal Co. as well as to settle the claims for damages, and it does not appear what portion of the warrants, issued in excess of the value of the property purchased, was for the price of the franchise and what portion for damages. Indeed, it does not at all appear that any of them were issued for damages. This seems to have been the view taken by the Supreme Court in answer to the complaint of the city that the price paid was excessive, for Mr. Justice Brown notes the fact that the consideration of $300,000 in warrants was fixed upon to cover not only the value of the property and the plant, but the exclusive franchise of the company under the act of 1871, and the claim for damages, as to which the appraiser came to no conclusion and fixed no special amount. New Orleans *v.* Warner, 175 U. S., 120.

But I do not consider the validity of the contract under which these warrants were issued to be now open for contestation. As to this, the decree of the circuit court in favor of the complainant, affirmed by the Supreme Court, of which all claimants who have come in under it are entitled to the benefit, is conclusive on the defendant. The court necessarily found the contract to be valid, and the question cannot be again agitated.

The exception of the defendant as to the amount of taxes due by private persons, for which the defendant is found accountable, is, also, in my opinion, untenable. It is now too late to urge this objection, as I am directed by the decree of reference to charge the defendant in the accounting with all these taxes, which have not been collected and accounted for; and I am not at liberty to inquire whether the unpaid taxes of this class are collectible or not. The defendant is concluded, in this respect, by the decision of the supreme court and of the court of appeals which holds the defendant liable on the express ground that it has made itself liable therefore as a delinquent trustee.

For these reasons, I am constrained to overrule the defendant's exceptions to the report as first drafted, and I respectfully return into

court all the proceedings had before me and evidence adduced by the parties, together with the defendant's said exceptions.

Respectfully submitted.

March 7th, 1900.

(Signed) A. G. BRICE, *Master.*

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

To the report of the Honorable A. G. Brice, special master herein, defendant, The City of New Orleans, objects on the following grounds, to wit:

First. That there is error in charging defendant with liability for the whole of the uncollected assessments against private property owned by private persons, because the evidence shows that all such taxes as could be or were susceptible of collection have been collected and paid over to the parties and purposes for which they were assessed.

Second. That the advantages of the decree herein, under which this reference is made, extend to such warrants as were used in payment of the property purchased by the act before G. Legardeur, notary public, of date June 7th, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750.00, and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the circuit court of appeals and of the supreme court herein; that such balance of said warrants were issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company, and Warner Van Norden, against the city of New Orleans; that of said warrants, the sum of $20,000.00 were issued, as will appear by the express terms of the said act, in payment of work which had been done by the said Van Norden, that is, digging canals and building levees, which, at the time of the passage of the said act, had not been surveyed or measured by the city surveyor, and hence, that as to these warrants there could be no recovery or allowance made; that in any event, the decree in the suit of J. W. Peake *vs.* City of New Orleans, No. 11614 of the United States circuit court for the eastern district of Louisiana, is *res judicata* in favor of this defendant.

That although there is no mark or sign upon any of the said warrants, which were issued in payment of the price of the property purchased, and which were given in settlement of the claim for damages, and which were executed and delivered in payment for drainage work which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payments of the price of said property, and which were issued for the other two purposes named; that it must

be considered that the warrants were issued and applied in the numerical order of their execution, first for the payment of the price of the property purchased, next to the settlement of the claim for damages, and lastly to the payment for work mentioned in said notarial act; that all of said warrants bear date June 6th, 1876, the first one bearing the number 313, and run up to and inclusive of the number 402, as is shown by the statement of the said warrants contained in the record, as well as the warrants themselves, offered in evidence.

That from an examination of the said warrants, and a comparison of their numbers, it will be seen, that with the issuance of warrant No. 332 there had been reached an issue of $150,000.00, adding to which, warrant 333, for $5,000.00 would make a total issue of $155,000.00, of a difference of $1,250.00 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

Payment of all warrants subsequent to warrant No. 333 should be refused.

(Signed) SAM'L L. GILMORE, *City Att'y*,
B. K. MILLER,
Solicitor for Def'd't.

Testimony Before A. G. Brice, Esq., Master in Chancery, on Claims of Warrant-holders.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Testimony Before A. G. Brice, Esq., Master in Chancery, on Claims of Warrant-holders.

NEW ORLEANS, LA.,
SATURDAY, *December* 10, 1898—3 o'clock p. m.

This case came up before the master this day at this office in the Hennen building.

Present: Mr. Richard de Gray and Mr. William Grant, solicitors for complainant, and other warrant-holders; Mr. Branch K. Miller, counsel for the city of New Orleans.

By Mr. MILLER: By appearing here it is done with the full reservation of whatever rights the city may have growing out of the application for a certiorari in this case to be presented in the Supreme Court of the United States on the 19th instant, of which notice has been given and accepted. This appearance not to be considered or intended as a waiver of whatever right the city may have under the application.

To which counsel for complainant reply that they now proceed subject to whatever rights the city may have under the reservation just made.

Mr. S. D. Moody, called for complainant, sworn:

Examined by Mr. Grant—on the claim of John Crossley & Son:

Q. Mr. Moody, what was your business and occupation in 1876 and prior thereto?

A. I was secretary of the Mexican Gulf Ship Canal Company and superintendent of the drainage work for Warner Van Norden, transferee.

Q. Are you familiar with the signature of Warner Van Norden?

A. I am.

Q. Do you know the signature of J. G. Brown, administrator of public accounts at that time and of E. Pilsbury, administrator of finance?

A. Yes sir.

Q. Examine the fifty-eight warrants filed before master under the claim of John Crossley & Son, Limited, and state whether the signatures of the said administrator of finance and of the administrator of accounts, signed to those warrants, are their genuine signatures?

(Counsel hands witness warrants referred to which witness examines closely.)

A. I have examined the warrants and these are their genuine signatures.

Q. The signatures of Warner Van Norden, transferee, endorsed on the warrants, state whether it is his genuine signature or not?

A. It is. The signature on the warrant is J. G. Brown and the signature to the presentation for payment is Pilsbury.

By Mr. Grant: I offer the warrants of John Crossley & Son, Limited, in evidence (herewith marked "1" to "58" inclusive), said warrants being numbered and representing amounts as follows:

				Amount.	Master's No.
Drainage warrants	No.	330	for.....	$5,000 00	1
"	"	319	"	10,000 00	2
"	"	321	"	10,000 00	3
"	"	367	"	2,000 00	4
"	"	366	"	2,000 00	5
"	"	365	"	2,000 00	6
"	"	364	"	2,000 00	7
"	"	363	"	2,000 00	8
"	"	362	"	2,000 00	9
"	"	361	"	2,000 00	10
"	"	360	"	2,000 00	11
"	"	359	"	2,000 00	12
"	"	358	"	2,000 00	13
"	"	357	"	2,000 00	14
"	"	356	"	2,000 00	15
"	"	355	"	2,000 00	16
"	"	354	"	2,000 00	17

				Amount.	Master's No.
Drainage warrant	No.	353	for.....	$2,000 00	18
" "	"	352	"	2,000 00	19
" "	"	351	"	2,000 00	20
" "	"	350	"	2,000 00	21
" "	"	349	"	2,000 00	22
" "	"	348	"	2,000 00	23
" "	"	347	"	2,000 00	24
" "	"	346	"	2,000 00	25
" "	"	345	"	2,000 00	26
" "	"	343	"	2,000 00	27
" "	"	340	"	5,000 00	28
" "	"	339	"	5,000 00	29
" "	"	368	"	2,000 00	30
" "	"	369	"	2,000 00	31
" "	"	370	"	2,000 00	32
" "	"	371	"	2,000 00	33
" "	"	372	"	2,000 00	34
Drainage warrants	No.	373	for.....	2,000 00	35
" "	"	374	"	2,000 00	36
" "	"	375	"	2,000 00	37
" "	"	376	"	2,000 00	38
" "	"	377	"	2,000 00	39
" "	"	378	"	2,000 00	40
" "	"	382	"	2,000 00	41
" "	"	383	"	2,000 00	42
" "	"	384	"	2,000 00	43
" "	"	385	"	2,000 00	44
" "	"	386	"	2,000 00	45
" "	"	387	"	2,000 00	46
" "	"	388	"	2,000 00	47
" "	"	389	"	2,000 00	48
" "	"	390	"	2,000 00	49
" "	"	391	"	2,000 00	50
" "	"	392	"	2,000 00	51
" "	"	393	"	2,000 00	52
" "	"	394	"	2,000 00	53
" "	"	395	"	2,000 00	54
" "	"	396	"	2,000 00	55
" "	"	397	"	2,000 00	56
" "	"	320	"	10,000 00	57
" "	"	344	"	2,000 00	58

On the Claim of F. J. Gasquet.

Q. Examine the six warrants presented to the master on the claim of F. J. Gasquet and state whether the names attached to those warrants by the administrator of finance and the administrator of accounts are their genuine signatures?

(Counsel hands witness warrants referred to, which witness examines.)

A. They are genuine.

Q. Examine the endorsement of Warner Van Norden, transferee and state whether that is his genuine signature?

A. It is.

By Mr. GRANT: I offer in evidence the warrants of F. J. Gasquet (herewith marked "59" to "64" inclusive), said warrants being numbered and representing amounts as follows:

	Amount.	Master's No.
Drainage warrant No. 333 for.....	$5,000 00	59
" " " 334 "	5,000 00	60
" " " 335 "	5,000 00	61
" " " 336 "	5,000 00	62
" " " 337 "	5,000 00	63
" " " 338 "	5,000 00	64

On the Claim of Wilder & Co.

Q. Examine the two warrants filed by Wilder & Co., on their claim and state whether the signatures of the administrator of finance and administrator of accounts signed thereto are their genuine signatures.

(Counsel hands witness warrants referred to, which witness examines.)

A. I have examined them and they are their genuine signatures.

Q. Examine the signature of Warner Van Norden, transferee, endorsed on the back of these warrants and state whether that is his genuine signature.

A. It is.

By Mr. GRANT: I offer in evidence the warrants of Wilder & Co. (herewith marked "65" and "66" respectively), said warrants being numbered and representing amounts as follows:

	Amount.	Master's No.
Drainage warrant No. 341 for.....	$5,000 00	65
" " " 402 "	2,000 00	66

By Mr. DE GRAY: On the claim of Wilder & Co., we also offer the bill of costs of the clerk, the marshal and the clerk of the circuit court of appeals; also, the petition, answer and judgment at law in the case of Wilder & Co. *vs.* The City of New Orleans, being No. 11380 on the docket of the United States circuit court.

On the Claim of John J. Donaldson.

By Mr. GRANT:

Q. Mr. Moody, examine the warrant filed by John J. Donaldson on his claim and state whether the signatures of the administrator of finance and the administrator of accounts are their genuine signatures.

(Counsel hands witness warrant referred to which witness examines.)

A. I have examined the warrant and they are their genuine signatures.

Q. Examine the signature of Warner Van Norden, transferee, endorsed on the back of said warrant and state whether that is his genuine signature.

A. It is.

By Mr. GRANT: I offer in evidence the warrant of John J. Donaldson (herewith marked "67") said warrant being numbered and representing amount as follows:

	Amount.	Master's No.
Drainage warrants No. 399 for.....	$2,000.00	67

On the Claim of the Suffolk Bank.

By Mr. GRANT:

Q. Mr. Moody, examine the signatures of the administrator of accounts and the administrator of finance signed to the six warrants filed on the claim of the Suffolk national bank and state whether the signatures are the genuine signatures of those persons.

(Counsel hands witness warrants referred to which witness examines.)

A. They are.

Q. Examine the signature of Warner Van Norden, transferee, endorsed on the back of each of those warrants, and state whether the same are his genuine signatures or not.

A. They are.

By Mr. GRANT: I offer in evidence the six warrants of the Suffolk national bank (marked herewith "68" to "73" inclusive), said warrants being numbered and representing amounts as follows:

	Amount.	Master's No.
Drainage warrant No. 313 for.....	$10,000 00	68
" " " 314 "	10,000 00	69
" " " 315 "	10,000 00	70
" " " 316 "	10,000 00	71
" " " 317 "	10,000 00	72
" " " 318 "	10,000 00	73

On the Claim of John G. Warner.

By Mr. GRANT:

Q. Mr. Moody, examine the signatures of the administrator of accounts and administrator of finance, signed to the three warrants filed on the claim of John G. Warner, and state whether the signatures signed thereto are genuine.

(Counsel hands witness warrants referred to which witness examines.)

A. I have examined and they are their genuine signatures.

Q. Examine the endorsements of Warner Van Norden, transferee, on the back of such warrants and state whether the same are his genuine signatures.

A. They are.

By Mr. GRANT: I offer in evidence the three warrants of John G. Warner (marked herewith "74" to "76" inclusive), said warrants being numbered and representing amounts as follows:

	Amount.	Master's No.
Drainage warrant No. 381 for.....	$2,000 00	74
" " " 380 "	2,000 00	75
" " " 379 "	2,000 00	76

On the Claim of F. N. Butler and Mrs. M. E. Taliaferro.

By Mr. GRANT:

Q. Examine the warrant filed in this case on the claim of F. N. Butler and Mrs. M. E. Taliaferro and state whether the signatures of the administrator of finance and administrator of accounts signed to said warrants are their genuine signatures. (Counsel hands warrant referred to — witness, which witness examines.)

A. They are.

Q. Examine the endorsement of Warner Van Norden, transferee, on the back of said warrant, and state whether the same is his genuine signature.

A. It is.

By Mr. GRANT: I offer in evidence the warrant of F. N. Butler and Mrs. M. E. Taliaferro (marked herewith "77"), said warrant being numbered and representing amount as follows:

	Amount.	Master's No.
Drainage warrant No. 342 for.....	$5,000.00	77

And I offer in evidence the certificate of the administrator of finance endorsed on each of the warrants presented by the foregoing claimants that said warrants were presented for payment June 6, 1876.

Q. Mr. Moody, do you know for what consideration and purpose these warrants were issued?

A. For the purchase of dredge-boats, material and contract; the franchises, rights and privileges of the Mexican Gulf Ship Canal Co., and Warner Van Norden, transferee, all signed.

By Mr. GRANT:

Q. They (the city) bought them out and made a complete settlement with them with those warrants?

A. Yes.

By Mr. GRANT:

Q. To whom were the warrants delivered when the act of sale was passed?

A. Well, the president and secretary of the company signed and Mr. Van Norden signed and the warrants were delivered to Mr. Van Norden.

Q. Do you know whether they were presented to the administrator of finance and the administrator of accounts?

A. We know they were and they show it on their face.

Q. Were you present at the time of the sale?

A. I was present and signed the act of sale as secretary of the Mexican Gulf and Ship Canal Company.

Q. You were familiar with the entire transaction?

A. I was.

By Mr. DE GRAY:

Q. How long had you known Mr. Van Norden, Mr. Moody, for several years prior to this transaction?

A. I have known Mr. Van Norden since '62, very intimate with him.

Q. And have seen him write very, very often?

A. Hundreds of times.

Q. And how were you acquainted with the people who signed the warrants, the two administrators, Brown and Pilsbury?

A. While the work was going on I went to them every month and — warrants for the work.

Q. And you saw them sign them very, very frequently?

A. Yes.

Q. And that is the way you became familiar with their signatures?

A. Yes.

Q. Mr. Moody, as I understand from your evidence, then, these warrants, concerning which you have testified and which you have examined, were a part of the warrants that were given for the purchase—were delivered under the bill of sale for the purchase that was made by the city of the Mexican Gulf Ship Canal Company and Warner Van Norden, transferee? They were drawn by the city for the purpose of paying for that property?

A. Yes.

Q. Mr. Moody, upon the delivery of these warrants that are specified in the act of sale that was executed before Le Gardeur, notary, what then became of the property that was referred to in that bill of sale, who took possession?

A. The city.

Q. And who delivered it?

A. Van Norden and the canal company—well, Van Norden and the canal company abandoned it to the city.

Q. You mean they delivered it after they had got the warrants, and they kept the warrants?

A. Yes, Van Norden and the canal company had had no more to do with it since.

By Mr. GRANT: On behalf of the complainant or others who have come in or may hereafter come in to get the benefit of the decree in

this case and the proceedings, we offer in evidence the record in this case, to wit, in the case of John G. Warner *vs.* The City of New Orleans, No. 12350, with all exhibits attached to the complainant's bill therein, together with all proofs by him offered, as detailed in his note of evidence filed in the circuit court on the 17th day of January, 1898, at the hearing. Also, the decree of the circuit court in the same cause dated the 5th of December, 1898, and all agreements of counsel contained in said record.

By Mr. DE GRAY: Complainant now offers the printed page 610 taken from the case of Peake *vs.* The City of New Orleans, headed "Recapitulation of assessments and amounts collected."

By Mr. GRANT: Mr. Robert C. Shortridge, a witness called by complainant, being present and offered as a witness, counsel for defendant waived his examination and agreeing that he would testify to the same effect as S. D. Moody who has been examined and would fully corroborate Mr. Moody's evidence.

Continued to Tuesday, December 13, 1898, at 3 o'clock p. m.

NEW ORLEANS, LA.,
TUESDAY, *December* 13, 1898—3.30 o'clock.

Pursuant to adjournment this case was called for hearing this day before the master.

Present: Mr. Richard De Gray and Mr. William Grant, counsel for complainant and other warrant-holders; Mr. J. J. McLoughlin, ass't city attorney, representing the city of New Orleans.

By consent the case was continued until tomorrow, December 14, 1898, 3.30 p. m.

NEW ORLEANS, LA.,
WEDNESDAY, *December* 14, 1898—3.30 p. m.

Pursuant to adjournment, this case called up this day before the master.

Present: Mr. Richard De Gray and Mr. William Grant, solicitors for complainant and other warrant-holders; Mr. Branch K. Miller and Mr. J. J. McLoughlin, ass't city attorney representing the city of New Orleans.

By Mr. MILLER: By appearing here it is done with the full reservation of whatever rights the city may have growing out of the application for a certiorari in this case to be presented in the Supreme Court of the United States on the 19th instant, of which notice has been given and accepted. This appearance not to be considered or intended as a waiver of whatever rights the city may have under that application.

By Mr. GRANT: I offer in evidence on the claim of Frank X. Butler and Mrs. E. M. Taliaferro decree of the civil district court, parish of Orleans in the succession of Geo. S. Lacey, No. 6530, to show that Mrs. Taliaferro was sole surviving heir of Geo. S. Lacey.

Continued to Thursday, Dec. 15, 1898, 3.30 p. m.

NEW ORLEANS, LA.,
THURSDAY, *December* 15, 1898—4 p. m.

This case was called up before the master this day pursuant to adjournment.

Present: Mr. Richard de Gray and Mr. William Grant, solicitors for complainant and other warrant-holders, Mr. Thomas J. Semmes, solicitor for Mr. James Jackson, warrant-holder; and Mr. J. J. McLoughlin, ass't city attorney and Mr. Branch K. Miller, counsel for the city of New Orleans.

By Mr. SEMMES: The signatures to the eight warrants owned by James Jackson filed herein and described in the claim, being

	Amount.	Master's No.
Drainage warrant No. 322 for.....	$10,000 00	78
" " " 323 "	5,000 00	79
" " " 324 "	5,000 00	80
" " " 325 "	5,000 00	81
" " " 326 "	5,000 00	82
" " " 327 "	5,000 00	83
" " " 328 "	5,000 00	84
" " " "	5,000 00	85

all dated June 6, 1876, all proof of signatures to which are waived by Mr. Miller, counsel for the city; including the endorsements on the back of the warrants; and the same are admitted to be genuine.

I offer in evidence the judgment of James Jackson against The City of New Orleans, number 11558, referred to in his claim, and also the record of the suit of James Jackson against The City of New Orleans and Jules Fontaine, receiver, No. 12660, in the circuit court of the United States, eastern district of Louisiana.

Continued to Friday, December 16th, 1898, 2 p. m.

NEW ORLEANS, LA.,
FRIDAY, *December* 16, 1898—2 o'clock p. m.

Pursuant to adjournment, this case was called up for hearing this day before the master.

Present: Mr. Richard de Gray and Mr. William Grant, solicitors for complainant.

Mr. CLARK STEEN, called for complainant, sworn.

Examined by Mr. GRANT:

Q. Mr. Steen, have you made a computation showing the amount of drainage assessments against the city as assessee of streets, squares and public places?

A. Yes, sir; from the transcript in this case of J. G. Warner *vs.* The City of New Orleans.

Q. Have you made a schedule of your computation?

A. Yes, sir.

Q. Will you produce it to the master?

A. This is Schedule 1, assessment of drainage taxes.

Q. What is the sum total you make it?

A. The sum total of assessments and interest calculated from the dates as appears in the schedule amounts to $1,798,465.57.

Q. Have you taken the dates for the beginning of interest from the judgment homologating the rolls?

A. Yes.

Q. And the computation is up to December 5, 1898?

A. The schedule shows the dates from which the interest was calculated to the date of the last judgment.

Q. Have you made a computation of the amount of taxes assessed against private person- and property in the city of New Orleans?

A. Yes, sir. In getting the assessment upon private property, I also went into the record of the Peake case No. 11614 of the United States circuit court and from there got the original assessment, deducted the amount of assessment on asylums, &c., and the amount collected by the commissioners, and also deducted the amount of assessment on city property, streets, &c., and then took that balance as the amount of assessment on private property turned over to the city authorities in each of the several districts.

Q. You have made a schedule showing your computation have you?

A. Yes.

Q. Will you hand it to the master? State whether you have had experience so as to render you competent to make these computations correctly?

A. Well, I have been employed in the city hall for some time and am a little familiar with the accounts, but I must say all these figures were taken from those records No. 336 and the records in the Peake case just mentioned. My figures that appear in the schedule I refer at all times to where I got them.

Q. And you got your figures from the copies of the original rolls?

A. From the records of the Peake case and from the case of Warner which purport to be copies of the original rolls. I checked the record in the Warner case with the record in the Peake case.

Q. Can you state whether your computations are correct or not?

A. I believe they are. I find a total assessment on private property of $1,008,034.41; I have deducted from that $1,000,000 the amount collected by the city of New Orleans to October, 1888 as appears in the recapitulation, pages 320 and 321 of the transcript in the Warner case, amounting to $273,401; also collections from October 1888 to June 20, 1891, which appears on page 344 of said transcript; also collections by Gurley, receiver, which appears on page 214 of transcript; collections by Gasquet, receiver, which appears on page 214 of the transcript; collections by Fontaine, receiver, which appears on page 488 of transcript, and the sum total of all the collections amount to $283,092.87, leaving a balance due of $724,941.54.

At the suggestion of counsel for the complainant the interest on this balance was computed from March 21, 1874, the date of the last

judgment of homologation to December 5th, 1898, at the rate of six per cent. per annum, making $1,075,329.95 added to the balance makes a grand total of $1,800,271.48.

By Mr. GRANT: The complainant is satisfied with the correctness of these computations and offers in evidence the computation sheets marked respectively Schedule- "1" and "2."

Adjourned without day.

NEW ORLEANS, LA.,
TUESDAY, *January 3d*, 1899—3.30 p. m.

This case was again called for hearing this day, before the master at his office-rooms 901–'3 Hennen building.

Present: Messrs. Richard de Gray and William Grant, solicitors for complainant and other warrant-holders; Mr. Thomas J. Semmes, solicitor for James Jackson, warrant-holder; Mr. W. R. Summerville, ass't city attorney.

By Mr. SUMMERVILLE: On behalf of the city of New Orleans, I desire to offer in evidence (1st) the bill, answer and decree of the record in J. W. Peake *vs.* City of New Orleans, No. 11614, United States circuit court, eastern district of Louisiana, found on pages 142, 160 and 359 respectively of the record of the Supreme Court in the case entitled City of New Orleans, appellant, *vs.* John G. Warner, appellee; (2nd) the intervening bill of James Jackson in the same case, found on page 358 of the same record; and (3d) the petition, answer and judgment at law in James Jackson *vs.* City of New Orleans, in suit No. 11558, United States circuit court, eastern district of Louisiana, found on pages 360, 361, 362, 363 respectively of the same record.

By Mr. SEMMES: I offer in evidence the opinion and decree of the Supreme Court of the United States in Peake *vs.* City of New Orleans as found in 139 U. S., 343, 361, inclusive, and it is agreed that the opinion and decree may be read from the printed volume instead of offering a written copy.

Adjourned.

NEW ORLEANS, LA.,
FRIDAY, *January* 6, 1899—3.30 p. m.

This case was called before the master this day for further evidence.

Present: Messrs. Richard De Gray and William Grant, solicitors for complainant and other warrant-holders; Messrs. Saunders & Miller, for certain warrant-holders; Mr. Thomas J. Semmes, solicitor for James Jackson, warrant-holder, and Mr. Branch K. Miller, attorney for the City of New Orleans.

Mr. S. D. MOODY, recalled, examined on the claim of Eliza J. Lyttle, dative tutrix, on her intervention.

By Mr. GRANT:

Q. Please examine the three drainage warrants now handed you, all dated June 6, 1876, and numbered as follows:

	Amount.	Master's No.
Drainage warrant No. 331, for.....	$5,000 00	
" " 332, "	5,000 00	
" " 398, "	2,000 00	

Signed by J. G. Brown, administrator of accounts, and E. Pillsbury, administrator of finance, payable to the order of Warner Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, and each endorsed Warner Van Norden, transferee, and state whether you recognize the same.

A. I have examined said drainage warrants and recognize them as part of the drainage warrants delivered by the city of New Orleans to Warner Van Norden under the bill of sale from the Mississippi & Mexican Gulf Ship Canal Company and Warner Van Norden, transferee, to the city of New Orleans, passed before G. L. Gardner, notary public, dated June 7, 1876.

Q. Please state in whose handwriting the same are.

A. Said endorsements on each of said warrants are in the genuine handwriting of Warner Van Norden, with which I am very familiar, having seen him write very often and with whose signature I am very familiar.

Q. Examine the signature to each of said warrants, of J. G. Brown, administrator of accounts, and E. Pillsbury, administrator of finance, and, if you know, state whose signatures those are.

A. I have examined said signatures. They are the genuine signatures of said J. G. Brown, at the time administrator of accounts, and E. Pillsbury, at the time administrator of finance; I am familiar with the signatures of both parties, have done much business with them at the city hall in their respective capacities. In fact, all of the warrants delivered under the before-mentioned act of sale, including those I have just examined, were delivered, after having been presented for payment to said administrator of finance, to Warner Van Norden, transferee of said Mississippi & Mexican Gulf Ship Canal Company, in my presence.

Counsel for intervenor offers in evidence the warrants dated and numbered as above.

Adjourned.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, JOANNA E. McCrossin, Mary E. Warner, and Harry Warner, Substituted,
vs.
CITY OF NEW ORLEANS.
No. 12350.

Testimony before A. G. Brice, Esq., Master in Chancery.

NEW ORLEANS, LA.,
WEDNESDAY, *February* 21, 1900—3.30 p. m.

This case is resumed under the order of the United States circuit court of date February 19, 1900, and hearing was had this day before the master, A. G. Brice, Esq., at his office, No. 903 Hennen building.

Present: Mr. Richard De Gray and Mr. William Grant, representing warrant-holders; Mr. Branch K. Miller, for the City of New Orleans, and representing Mr. S. L. Gilmore, city attorney, excused.

Mr. JAMES JACKSON, warrant-holder, being sworn, testifies as follows:

Examined by Mr. GRANT, who with Mr. De Gray now appear for Mr. Jackson as successors to Mr. Thomas J. Semmes, representing the claim of Mr. Jackson filed in this suit:

Q. Mr. Jackson, are you the Mr. James Jackson, who appears in the record of James W. Peake *vs.* The City of New Orleans, No. 12008, as an intervenor?

A. Yes, sir.

Q. Did you ever see the intervention before it was filed by Mr. Semmes?

A. Never.

By Mr. MILLER: I object to that on the ground that the acts of Mr. Semmes filed in the intervention cannot be questioned in manner and form as now attempted.

By Mr. GRANT:

Q. Prior to the filing of that intervention did you at any time authorize or direct Mr. Semmes to state that the warrants held by you were given for work?

A. Those—they were purchase warrants.

Q. You never authorized Mr. Semmes to state in the intervention that they were given for work?

A. Never.

Q. Did Mr. Semmes ever inform you that he would state in this intervention that your warrants were given for work?

A. No, sir.

Q. Did you have any knowledge of the contents of the intervention before it was filed or afterwards?

A. Never.

Q. Of course, you were never sworn to the intervention?

A. Never did.

Cross-examination by Mr. MILLER:

Q. You knew, Mr. Jackson, Mr. Semmes had filed an intervention in the Peake case for you?

A. Not until after it was done.

Q. How long after it was done?

A. I don't recollect.

Q. You mean after the filing of the intervention?

A. Yes.

Q. Did you know of the intervention being filed prior to the decree of the circuit court in that case?

A. No, sir; I did not.

Q. You knew at the time the case was tried in the circuit court if Mr. Semmes was representing you in some way or other? He had your authority to do or to take any proceedings he thought proper to collect for you?

A. As far as verbal authority was concerned.

Q. The authority was not in writing?

A. No.

Q. But it was authority to do what he thought proper?

A. To collect the money, if possible. He had so much retaining fee and so much for money collected.

Q. You left it to his judgment what would be the proper judicial proceedings to effect your purpose?

A. Yes, sir; as a lawyer.

Q. The warrants that you held were purchase warrants?

A. Yes.

Q. Those you gave Mr. Semmes to collect?

A. Yes, sir.

Q. The same kind of warrants as those held by Mr. Warner, the plaintiff in this case?

A. Yes, sir.

By Mr. GRANT: It is admitted that Mr. Frank N. Butler is dead; that the warrant filed with the claim of Frank N. Butler and Mary E. Taliaferro was originally the property of Lacey & Butler, and that Mrs. Taliaferro is entitled to such portion as was bequeathed to her by George S. Lacey, to wit, two-thirds interest therein, and Mrs. Frank N. Butler is entitled to the other third therein in her own right as surviving widow in community and in her capacity as executrix. It is agreed that the signatures of the various witnesses for both sides to their depositions be dispensed with.

By Mr. DEGRAY: We reoffer the evidence heretofore taken before the master on this reference.

By Mr. MILLER: It is understood that the evidence offered by the defendant, set out in the statement thereof, here tendered in evidence (filed herewith and marked Exhibit "A") shall be read and used from the record of this case described in said memorandum to be taken and construed the same as if each piece of evidence was separately offered.

Mr. JUSTE FONTAINE, JR., called for defendant, being sworn, testified as follows:

Examined by Mr. MILLER:

Q. You are the present receiver of the drainage taxes?

A. Yes, sir.

Q. Appointed by the United States circuit court for the eastern district of Louisiana?

A. Yes, sir.

Q. In the case of James W. Peake *vs.* The City of New Orleans, No. 12008?

A. Yes, sir.

Q. You have been examined heretofore in this case?

A. Yes, sir.

Q. Are you still acting as receiver?

A. Yes, sir.

Q. Since your examination in this case formerly, before the reference to the master, have you made any collections of drainage taxes as receiver?

A. Yes, sir.

Q. How much?

A. February 24, 1899, $2.50; November 27, 1899, $1.50; November 24, 1899, $4.50; December 7, 1899, $4.50; December 7, 1899, $1.00; for 1900, January 12, $4.50; January 15, $8.00; total, $26.00.

Q. Mr. Fontaine, have you used due diligence and effort to collect all that could be reasonably collected from these taxes?

A. I have, sir.

Q. Do you think any more can be collected than you have already?

A. I know that more could not have been collected; these collections were from notaries who are my personal friends; that was the only reason advanced for which they were willing to pay the taxes; those who were not my personal friends, lawyers and notaries, refused to pay.

Q. Could you have collected any more by coercion or process of law?

A. No, I have filed two suits in the second city court and had an adverse decision each time; and two suits in the civil district court for small amounts, decided the same way.

Q. Do you think any more of those drainage taxes can be made collectible?

A. Do you mean by process of law?

Q. Yes.

A. You are asking me a question that involves a legal opinion. I say, yes, sir; I think so.

Q. The decisions have been against you?

A. In the civil district court and in the city court, as I stated before, but believe in the United States courts that we certainly ought to be able, in my opinion, to collect the taxes.

Q. Have you made any effort in that direction?

A. I have not; I am now under instructions from Mr. Louque to prepare a list of all the assessments for drainage taxes due and

unpaid in the city of New Orleans, and when we get them in a bulk, our intention is to make one large suit.

Q. You have that project on hand?

A. Yes, sir.

Q. Mr. Louque is your attorney?

A. Yes, sir.

Q. Aside from the legal questions?

A. It is impossible to collect.

Q. What is you- idea of what will be realized if you sell the property, if you should be allowed to do that?

A. You mean by the property, the property in the hands of the receiver?

Q. The property subject to the drainage taxes.

A. You mean outside of the legal aspect of the case?

Q. Yes.

A. I should say $300,000.

Q. Do you think that much could be collected?

A. Yes.

Q. That depends upon the result of this contemplated suit?

A. Certainly.

Q. You mean there is enough behind the taxes to realize that?

A. Yes, low estimate.

Q. You have gone over that subject?

A. Yes, sir.

Q. You propose doing that if it can be done?

A. Yes, sir.

Q. And that assumes you pass by all the difficulties heretofore encountered in the collection of those taxes?

A. Yes, sir.

Cross-examined by Mr. GRANT:

Q. Are you a lawyer?

A. Yes, sir.

Q. On what grounds do you expect to recover drainage taxes now against private persons?

A. That is a question I had rather not answer.

Q. You have been answering other questions, have been giving your opinion so far, let me ask?

A. To be frank with you, I take the opinion of Mr. Louque; he says it can be done, and I take his word for it.

Q. This is his opinion. Have you any reasons of your own?

A. Reasons of my own outside of his, no sir.

Q. So that your opinion is Mr. Louque's opinion?

A. Exactly.

Q. And you don't know what Louque's opinion is?

A. I do not know.

Q. Mr. Louque is your attorney?

A. Yes, sir.

By Mr. MILLER:

Q. How long have you been receiver?

A. The 19th of March, 1900, will be three years.
Q. You succeeded Mr. Gasquet, did you not?
A. Yes, sir.

By Mr. DE GRAY:

Q. That is the sum total of collections without reference to any indebtedness for expenses?
A. The expenses have been very light, I think $12 printing of releases.
Q. Expenses $12, and then up to this date you have not yet made any charge for your own services?
A. No, sir; that does not include the charge.

By Mr. MILLER:

Q. These possible collections, they refer only to the assessments against private persons, the $300,000 which Mr. Louque thinks will be realized?
A. Yes, sir.
Q. Out of the assessment against private property not on the streets and public squares of the city?
A. No, that is not included.

Defendants offer evidence as detailed in document filed with the master, February 26, 1900, and marked herewith Exhibit "X."
Complainants offer evidence as detailed in document marked Exhibit "Y," filed with the master, February 26, 1900.

The foregoing is a full and complete record of all proceedings had before me and evidence adduced by the respective parties on the hearing of reference in this cause, and the same are now certified to the court as part of my report.

(Signed) A. G. BRICE, *Master.*

March 7, 1900.

Claims of Various Persons Filed Before Master.

Claim of Frank N. Butler *et al.*, filed with warrants marked 77, before master Dec. 10, 1898, and filed in court with master's report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now came Frank N. Butler and Mrs. Widow M. E. Taliaferro, and accepting the benefit of the proceedings in the above-entitled cause and of the final decree entered therein on the 5th day of December, 1898, present and file with the master the following warrant

owned by them which is of the same character as those sued on by complainant, dated June 6, 1876, viz:

Warrant No. 342 for the sum of $5,000.00.

Claimant Frank N. Butler is owner of a one-third interest in said warrant as a member of the late firm of Lacy & Butler; and claimant Mrs. Widow M. E. Taliaferro is owner of the other two-thirds as universal legatee of Geo. S. Lacy, under his will probated in the civil district court for the parish of Orleans under the number 6530, August 4, 1882.

And they pray that their rights as holders of said warrant and creditor of the city of New Orleans may be established in this proceeding; and that the amount due on said warrant, including 8 per cent. interest per annum from June 6, 1876, date of presentation of same for payment, may be found and certified to the court for payment out of the trust fund created by said decree; and they pray for all such general relief as the master and the court are competent to give and for costs.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Sol's for Claimant.

Appearance of Mrs. Frank N. Butler, Executrix, and Letters Testamentary.

Filed February 21, 1900, before master, and filed in court with report of master March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now comes Mrs. Frank N. Butler, in her individual capacity as widow in community, and as executrix of the last will and testament of Frank N. Butler, her deceased husband, and makes herself a party to the claim heretofore filed before the master, in the name of her said late husband, and Mary E. Taliaferro, and she prays that she be substituted in his place, and be permitted to prosecute said claim in her said capacities.

Appearer files herewith a certified copy of the letters testamentary to her in the succession of her said deceased husband, No. 61179, civil district court for the parish of Orleans, dated January —, 1900.

(Signed) R. DE GRAY,
ROUSE & GRANT, *Solicitors.*

Let Mrs. F. N. Butler in her capacity as executrix of the estate of her late husband be authorized te represent said estate and sub-

stituted in the place and stead of her late husband as also in her own right. 2, 21, 1900.

(Signed) A. G. BRICE, *Master.*

Filed this 21st day of February, 1900.

THE STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division E.

To all to whom these presents may come, Greeting:

Whereas Mrs. Frank N. Butler named and appointed testamentary executrix of the last will and testament of the late Frank N. Butler, deceased, has applied to the civil district court for the parish of Orleans by petition, praying said court to grant letters testamentary therein:

Now know ye, that the said Mrs. Frank N. Butler is hereby authorized and empowered to collect all the goods and effects which were of said Frank N. Butler, deceased, and to make a just inventory thereof, and all other lawful acts to do and perform as testamentary executrix of the said last will and testament,

Witness our hand and the seal of said court, at the city of New Orleans this — day of January, in the year of our Lord one thousand nine hundred and the 124th of the Independence of the United States of America.

[SEAL.] (Signed) GEO. H. THEARD, *Judge.*
(Signed) F. E. PETERSON, *Dy Clk.*

A true copy.
(Signed) F. E. PETERSON.

(Endorsed:) No. 61179. Civil district court for the parish of Orleans. Succession of Frank N. Butler. Letters testamentary.

Claim of F. J. Gasquet.

Filed with warrants marked 59 to 64, incl., before master, December 10, 1898, and filed in court with report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now comes F. J. Gasquet, and accepting the benefit of the proceedings in the above-entitled cause and of the final decree entered therein on the 5th day of December, 1898, presents and files with the master the following drainage warrants dated June 6, 1876,

owned by him which are of the same class and character as those sued on by complainant, viz:

Drainage warrant	No.	333	for		$5,000.00
"	"	334	for		5,000.00
"	"	335	for		5,000.00
"	"	336	for		5,000.00
"	"	337	for		5,000.00
"	"	338	for		5,000.00
					$30,000.00

And he prays that his rights as holder of said warrants and a creditor of the city of New Orleans, may be established in this proceeding; and that the amount of said warrants with 8 per cent. interest thereon per annum from June 6, 1876, the date when said warrants were presented for payment, may be passed and certified to the court for payment out of the trust fund established by said decree; and he prays for all general relief in the premises such as the master and the court *is* competent to give under said decree and for costs.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Solicitors for Claimant.

Claim of John Crossly & Son, Ltd.

Filed with warrants marked "1" to "58," incl., before master, December 10, 1898, and filed in court with report March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now comes John Crossly & Son, Limited, a body corporate under the laws of Great Britain, and accepting the benefit of the proceedings in the above-entitled cause, and of the final decree rendered therein December 5, 1898, presents and files with the master the following drainage warrants owned by it, dated June 6, 1876, which are of the same character as those sued on by the complainant, viz:

Drainage warrant	No.	330	for		$5,000.00
"	"	319	"		10,000.00
"	"	321	"		10,000.00
"	"	367	"		2,000.00
"	"	366	"		2,000.00
"	"	365	"		2,000.00
"	"	364	"		2,000.00
"	"	363	"		2,000.00
"	"	362	"		2,000.00

Drainage warrant	No.	361	for	.....	2,000.00
"	"	360	"	.....	2,000.00
"	"	359	"	.....	2,000.00
"	"	358	"	.....	2,000.00
Drainage warrant	No.	357	for	.....	2,000.00
"	"	356	"	.....	2,000.00
"	"	355	"	.....	2,000.00
"	"	354	"	.....	2,000.00
"	"	353	"	.....	2,000.00
"	"	352	"	.....	2,000.00
"	"	351	"	.....	2,000.00
"	"	350	"	.....	2,000.00
"	"	349	"	.....	2,000.00
"	"	348	"	.....	2,000.00
"	"	347	"	.....	2,000.00
"	"	346	"	.....	2,000.00
"	"	345	"	.....	2,000.00
"	"	343	"	.....	2,000.00
"	"	340	"	.....	5,000.00
"	"	339	"	.....	5,000.00
"	"	368	"	.....	2,000.00
"	"	369	"	.....	2,000.00
"	"	370	"	.....	2,000.00
"	"	371	"	.....	2,000.00
"	"	372	"	.....	2,000.00
"	"	373	"	.....	2,000.00
"	"	374	"	.....	2,000.00
"	"	375	"	.....	2,000.00
"	"	376	"	.....	2,000.00
"	"	377	"	.....	2,000.00
"	"	378	"	.....	2,000.00
"	"	382	"	.....	2,000.00
"	"	383	"	.....	2,000.00
"	"	384	"	.....	2,000.00
"	"	385	"	.....	2,000.00
"	"	386	"	.....	2,000.00
"	"	387	"	.....	2,000.00
"	"	388	"	.....	2,000.00
"	"	389	"	.....	2,000.00
"	"	390	"	.....	2,000.00
"	"	391	"	.....	2,000.00
"	"	392	"	.....	2,000.00
"	"	393	"	.....	2,000.00
"	"	394	"	.....	2,000.00
"	"	395	"	.....	2,000.00
"	"	396	"	.....	2,000.00
"	"	397	"	.....	2,000.00
"	"	320	"	.....	10,000.00
"	"	344	"	.....	2,000.00
					$149,000.00

And the said John Crossly & Son, Limited, prays that its rights as holders of said warrants and creditor of the defendant may be established in this proceeding; and that the amount due on said warrants including eight per cent. interest thereon per annum from June 6, 1876, the date when the same were presented for payment, may be found and certified to the court to be paid out of the trust fund created by said decree; and it prays for all such further relief as the master and the court is competent to give, and for costs.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Sols. for Claimant.

Claim of Wilder & Company.

Filed with warrants marked 65 to 66, incl., before master, December 10, 1898, and filed in court with report March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now come C. T. Wilder and A. H. Wilder, composing the commercial firm of Wilder & Co., and accepting the benefit of the proceedings and of the final decree in the above-entitled cause entered on the 5th day of December, 1898, present and file with the master the following drainage warrants issued by the city of New Orleans, dated June 6, 1876, payable to Warner Van Norden, transferee, and by him endorsed, the same being of the character and class of warrants sued on in said cause by the complainant, viz:

One drainage warrant No. 341 for.....	$5,000.00
" " " " 402 "	2,000.00

Judgment on said warrants was rendered in favor of said Wilder & Co. against the City of New Orleans by the circuit court of the United States for this district, No. 11380 of the docket, on the 24th and signed on the 28th day of May, 1898, for the amount of said warrants ($7,000) with 8 per cent. interest from June 6, 1876, until paid; and costs of suit, amounting to $215.35, as will more fully and at large appear from a copy of the judicial record filed herewith and made part of this application.

And they pray that the master examine and establish their claim under said decree, and certify the same to the court for payment out of the trust fund established for the benefit of holders of drainage warrants; and especially that they be allowed 8 per cent. interest on

said warrants from June 6, 1876, until paid, and the costs incurred in said suit at law.

(Signed) C. S. RICE,
R. DE GRAY,
ROUSE & GRANT, *Solicitors.*

For exhibit to claim see page 74.

Claim of Mrs. Lytle, Tutrix, 3 *Warrants,* $12,000.

Filed before master Jan. 6, 1899, and filed in court with report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

Before A. G. Brice, master.

And now comes Mrs. Eliza J. Lytle (widow) dative tutrix of minor heirs of Frank A. Lee late of New Orleans, deceased, and accepting the benefit of the proceedings in the above-entitled cause and of the final decree rendered therein on the 5th day of December, 1898, presents and files with the master the following drainage warrants owned by her, dated June 6th, 1876, which are of the same character as those sued on by the complainant, viz:

Drainage warrant No. 331 for	$5,000
Drainage warrant No. 332 for	5,000
Drainage warrant No. 398 for	2,000

And claimant prays that her rights as holder of said warrants and creditor of the city of New Orleans may be established in this proceeding, and that the amount due on said warrants, including eight per cent. interest thereon, per annum, from June 6th, 1876, may be found and certified to the court to be paid out of the trust fund established by said decree.

And she prays for all such further relief as the master and the court are competent to give, and for costs.

(Signed) SAUNDERS & MILLER,
Sol'rs for Mrs. E. J. Lytle, Tutrix, etc.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Of Counsel.

Claim of Suffolk National Bank.

Filed with warrants marked 68 to 73, incl., before master, December 10, 1898, and filed in court with report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now comes the Suffolk National Bank of Boston, and accepting the benefit of the proceedings in the above-entitled cause, and of the final decree entered therein on the 5th day of December, 1898, presents and files with the master the following drainage warrants dated June 6, 1876, owned by it, which are of the same class and character as those sued on by complainant, viz:

Drainage warrant	No.	313	for	.....	$10,000 00
"	"	314	"	.....	10,000 00
"	"	315	"	.....	10,000 00
"	"	316	"	.....	10,000 00
"	"	317	"	.....	10,000 00
"	"	318	"	.....	10,000 00

And said bank prays that its rights as holder of said warrants and creditor of the defendant may be established in this proceeding; and that the amount of said warrants with 8 per cent. interest per annum thereon from June 6, 1876, the date when the same were presented for payment may be found and certified to the court as payable out of the trust fund established by said decree; and it prays for all such general relief in the premises as the master and the court *is* competent to give under said decree, and for costs.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Sol'rs for Claimant.

Claim of John J. Donaldson.

Filed with warrants marked 67, before master, December 10, 1898, and filed in court with report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Now comes John J. Donaldson, and accepting the benefit of the proceedings in the above-entitled cause, and of the final decree entered therein on the 5th day of December, 1898, files and presents to the master the following drainage warrant dated June 6, 1876,

owned by him, which is of the same class and character as those sued on by the complainant, viz:

Drainage warrant No. 399 for..... $2,000 00

And he prays that his rights as holder of said warrant and creditor of the defendant may be established in this proceeding; and that the amount due on said warrant including 8 per cent. interest thereon per annum from June 6, 1876, the date when the same was presented for payment, may be found and certified to the court as payable out of the trust fund created by said decree; and he prays for all such general relief in the premises as the master and the court are competent to give under said decree, and for costs.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Sols. for Claimant.

SCHEDULE 1. Filed March 7th, 1900.

Assessment of drainage taxes against the city of New Orleans on streets and squares and 6% interest from date of homologation.

First district:	
Rolls homologated March 21, 1874, as per itemized statement pages 42 to 45 of transcript.....	$223,205 60
Interest from March 21, 1874, to Dec. 5, 1898, at 6%—24 years and 260 days.....	331,088 30
Second district:	
Rolls homologated in Jefferson parish March 16, 1869, as per itemized statement pages 51 and 52 of transcript.....	123,751 99
Interest from March 16, 1869, to Dec. 5, 1898, at 6%—29 years and 265 days.....	220,794 17
Rolls homologated in Orleans parish, Nov. 11, 1868, as per itemized statement pages 63 to 65 of transcript.....	71,428 20
Interest from Nov. 11, 1868, to Dec. 5, 1898, at 6%—30 years and 25 days.....	128,868 37
Third district:	
Rolls homologated November 8, 1872, as per itemized statement pages 75 and 76 of transcript.....	207,270 19
Interest from November 8, 1872, to Dec. 5, 1898, at 6%—26 years and 28 days.....	324,308 75
Fourth district:	
Rolls homologated March 21, 1873, as per judgment, page 88 of transcript and agreement marked "Defendant S," page 543 of transcript.....	65,956 75
Interest from March 21, 1873, to Dec. 5, 1898, at 6%—25 years and 260 days.....	101,793 25
Total assessments and interest.....	$1,798,465 57

Filed Dec. 16, 1898.

A. G. BRICE, *Master.*

SCHEDULE 2. Filed March 7th, 1900.

Assessments of Drainage Taxes Against Private Property and 6% Interest from the 21st Day of March, 1874.

First district:			
Total assessments of district as appears in record of Peake case, No. 11614 U. S. C. court, document marked "Recapitulation of assessments and collections by board of commissioners," etc..		$751,401 80	
Deduct—			
Amount assessments asylums, etc.....	$171,239 11		
Amount collected by commissioners.....	79,448 67		
		250,687 78	
		$500,714 02	
Deduct amount assessment on city property, streets, etc		223,205 60	
Balance transferred to city authorities.....			$277,508 42
Second district:			
Total assessments of district as appears in above-described documents, Peake case.....		$545,400 35	
Deduct amount collected by commissioners.....	$255,492 95		
Deduct amount assessments city property, streets, etc..	195,170 19		
		450,663 14	
Balance transferred to city authorities.....			94,737 21
Third district:			
Total assessment of district as appears in above-described document Peake case..		$627,598 93	
Deduct amount assessments city property, streets, etc.....		207,270 19	
Private property assessments.....			$420,328 74
Total			$1,008,034 41

Deduct—		
Amount drainage taxes collected and expended by the city of New Orleans to October, 1888. See recapitulation, pages 320 and 321 of transcript.....	$273,401 85	
Collections from October, 1888, to June 20, 1891, page 344 of transcript.....	2,728 02	
Collections by Gurley, receiver, page 214 transcript.....	5,749 15	
Collections by Gasquet, receiver, page 214 transcript.....	1,134 85	
Collections by Fontaine, receiver, page 488 transcript.....	79 00	
		$283,092 87
Balance due		$724,941 54
Interest on this balance computed from March 21, 1874, the date of the last judgment of homologation, to Dec. 5, 1898, by suggestion of counsel for complainant, at 6%—24 years and 260 days.....		1,075,329 95
		$1,800,271 49

Filed Dec. 16, 1898.

A. G. BRICE, *Master.*

Motion to File and Record Mandate of the U. S. Supreme Court.

Filed March 7, 1900, and filed before master February 21, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, JOANNA E. MCCROSSIN, Mary E. Warner, and Harry Warner, Substituted,
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray and Rouse & Grant, solicitors for complainants, and on suggesting to the court that since the filing of the mandate of the United States circuit court of appeals for the fifth circuit herein, on the 5th day of December, 1898, and the entry of the judgment and decree based thereon, under which the case was referred to A. G. Brice, Esq., master in chancery to examine and report pursuant to said decree, this cause was removed to the Supreme Court of the United States on writ of certiorari, where, after due proceedings, the decree of said United States circuit court of appeals was affirmed with costs, on the 15th day of January, 1900, as per the mandate of said Supreme Court now presented.

It is ordered that said mandate be now filed and that the decree of the Supreme Court therein contained in the words and figures following, be recorded, to wit:

"It is now here ordered, adjudged and decreed by this court that

the decree of said United States circuit court of appeals in this cause be, and the same is hereby, affirmed with costs; and that the said appellant, John G. Warner, recover against the said appellee for his costs herein expended and have execution therefor,

"And it is further ordered that this cause be, and the same is hereby remanded to the circuit court of the United States for the eastern district of Louisiana with a direction to comply with the decree of 'the circuit court of appeals.'"

And it is now ordered by this court that the master herein proceed forthwith with his accounting and report in accordance with the decree herein entered on said 5th day of December, 1898, pursuant to the decree of said United States circuit court of appeals, affirmed as aforesaid with a direction to this hon. court to comply therewith.

Signed as of date February 19th, 1900, *nunc pro tunc.*

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Feb. 20, 1900.

CLERK'S OFFICE.

I certify the foregoing to be a true copy of the original on file.

(Signed) E. R. HUNT, *Clerk,*

[SEAL.] By H. J. CARTER, *D'y Clerk.*

Complainants' Additional Offering.

Filed March 7, 1900; filed before master February 26, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, ET ALS., Substituted, *vs.* THE CITY OF NEW ORLEANS. } No. 12350.

Complainant produces and offers in evidence—in addition to the offerings heretofore made—the following extract taken from the offering of the city of New Orleans (statement of drainage warrants issued) filed in the case of Peake *vs.* New Orleans, and found on page 587 of the printed record (U. S. Supreme Court) of said Peake case, namely—

"Issued in conformity with ordinance No. 3539, A. S., dated May 23, 1876, warrants Nos. 313 to 392, inclusive..	$300,000
"Issued in compromise of judgment against the city of New Orleans for $24,000. For drainage tax due on New Orleans park, warrrants Nos. 393 to 402, inclusive..	20,000"

Defendant's Offer of Evidence.

Filed Feb. 26, 1900, before master, and filed in court March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before Honorable A. G. Brice, special master.

Defendant offered, introduces and files in evidence:

1. Statement of purchase warrants, or warrants issued June 6th, 1876, under—

The act of sale of June 7th, 1876, by the Mississippi & Mexican Gulf Ship Canal Company and Warner Van Norden to the city of New Orleans, before Gustave Legardeur, notary public.

		Number of warrant.	Amount of warrant.
1876.	June 6	313	$10,000
	" "	314	10,000
	" "	315	10,000
	" "	316	10,000
	" "	317	10,000
	" "	318	10,000
	" "	319	10,000
	" "	320	10,000
	" "	321	10,000
	" "	322	10,000
	" "	323	5,000
	" "	324	5,000
	" "	325	5,000
	" "	326	5,000
	" "	327	5,000
	" "	328	5,000
	" "	329	5,000
	" "	330	5,000
	" "	331	5,000
	" "	332	5,000
	" "	333	5,000
	" "	334	5,000
	" "	335	5,000
	" "	336	5,000
	" "	337	5,000
	" "	338	5,000
	" "	339	5,000
	" "	340	5,000
	" "	341	5,000
	" "	342	5,000

1876.	June 6	343	2,000
	" "	344	2,000
	" "	345	2,000
	" "	346	2,000
	" "	347	2,000
	" "	348	2,000
	" "	349	2,000
	" "	350	2,000
	" "	351	2,000
	" "	352	2,000
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	" "	388	2,000
	" "	389	2,000
	" "	390	2,000
	" "	391	2,000
	" "	392	2,000
	" "	393	2,000

1876.	June 6	394	2,000
	" "	395	2,000
	" "	396	2,000
	" "	397	2,000
	" "	398	2,000
	" "	399	2,000
	" "	402	2,000

Warrants Nos. 400 and 401 paid.

2. Report of T. S. Hardee, city surveyor, showing inventory and appraisement of the effects of the Mississippi & Mexican Gulf Ship Canal Company to be transferred to the city of New Orleans under the above act, being page No. 117 and following of Record No. 364, U. S. circuit court of appeals.

3. Hearing and submission in the case of J. W. Peake *vs.* City of New Orleans, No. 11614, United States circuit court for the eastern district of Louisiana, as shown by an extract from the minutes of said court found on pages 102 *et seq.*, of the printed record of said cause.

4. Agreement as to the transcript in said case, as found on page 779 of the said printed record.

5. Decree in the same cause, as found on page 779 of the said record.

6. Motion and order for appeal, and bond for appeal, in the same cause, as found on page 780 of the said record.

7. Ordinances of the city of New Orleans Nos. 3479 and 3539, both administration series, found on pages 104 and 105 of the printed record of said cause, being found on page 134 of record 364, U. S. circuit court of appeals.

8. Report of O. B. Sansum, master, in J. W. Peake *vs.* City of New Orleans, No. 11614, United States circuit court for the eastern district of Louisiana, as found in the printed record of said case, pp. 49 to 94, inclusive.

9. Exceptions to master's report, page 95 and following of Peake case.

It is stipulated, that all of the offerings above made which are contained in the printed records of this case and the said case of Peake *vs.* New Orleans, shall be read from the same, without the necessity of separately copying the said offers, and putting them in the record; such offers in this form to be taken, considered, and construed the same as though each were physically filed as a separate document in this proceeding.

Agreement as to Transcript.

Filed March 31, 1900.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

It is admitted that all the drainage warrants produced, offered and filed in evidence before the master and filed with his report in this hon. court are in the same form and of the same date as those of the complainant (of which a sample copy is to be found on page 141 of the "Transcript of Record" in the suit entitled John G. Warner *vs.* The City of New Orleans, No. 364 on the docket of the United States circuit court of appeals for the fifth circuit) and only differ therefrom in the number and amount of each warrant.

And it is further admitted that the number and amount of each warrant so offered and filed is correctly stated by the master in his process verbal on file herein.

And it is agreed that in making the transcript, the clerk of this hon. court shall not copy each or any of said warrants offered and filed as aforesaid, but that this admission and agreement stand in the place thereof.

New Orleans, March 30, 1900.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

(Signed) S. L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Defendant.

Report of T. S. Hardee, city surveyor, showing inventory and appraisement of the effects of the Mississippi & Mexican Gulf Ship Canal Company to be transferred to the city of New Orleans under the above act.

NOTE.—To be read from page No. 117 and following of printed Record No. 364, U. S. circuit court of appeals, as per stipulation, p. 67 of this transcript.

Hearing and submission in the case of J. W. Peake *vs.* City of New Orleans, No. 11614 United States circuit court for the eastern district of Louisiana, as shown by an extract from the minutes of said court found on pages 102 *et seq.*, of the printed record of said cause.

NOTE.—To be omitted from the transcript hereof, as per agreement at page 82 hereof.

(J. W. Peake *vs.* City, No. 11614, U. S. circuit court, eastern dist. La.)

Agreement as to the transcript in said case, as found on page 779 of the said printed record.

NOTE.—To be omitted from the transcript hereof, as per agreement at page 82 of this transcript.

Decree in the same cause, as found on page 779 of the said record, J. W. Peake *vs.* City, No. 11614, U. S. circuit court, eastern dist. of La.

NOTE.—To be read from the printed Record No. 364, U. S. circuit court of appeals, as per stipulation copied at page 67 of this transcript.

Motion and order for appeal, and bond for appeal, in the same cause (J. W. Peake *vs.* City, No. 11614, U. S. circuit court, eastern dist. of La.) as found on page 780 of the said record.

NOTE.—To be read from the printed Record No. 364, U. S. circuit court of appeals, as per stipulation copied at page 67 of this transcript.

Ordinances of the city of New Orleans No. 3479 and 3539, both administration series, found on pages 104 and 105 of the printed record of said case (J. W. Peake *vs.* City, No. 11614, U. S. circuit court, eastern dist. of La.).

NOTE.—To be read from page 134 of printed Record 364, U. S. circuit court of appeals, as per stipulation at page 67 of this transcript.

Report of O. B. Sansum, master, in J. W. Peake *vs.* City of New Orleans, No. 11614 United States circuit court for the eastern district of Louisiana, as found in the printed record of said case, pp. 49 to 94, inclusive.

NOTE.—To be omitted from this transcript, as per agreement copied at page 82 hereof.

Exceptions to master's report, page 95 and following of Peake case.

NOTE.—To be read from the printed record of the case of Peake *vs.* New Orleans, as per stipulation copied at page 67 of this transcript.

Offer of Evidence.

Filed March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before Honorable A. G. Brice, master.

Defendant offers, introduces and files in evidence the following:

Testimony of James B. Guthrie, found on pages 364 *et seq.*, of the printed record of this case, No. 640, of the Supreme Court of the United States, being page 213 of Record No. 691, U. S. circuit court of appeals.

Testimony of J. W. Gurley, found on pages 386, *et seq.*, of the said record, being page 237 of Record No. 691, U. S. circuit court of appeals.

Testimony of Joseph Desposito, found on pages 432, *et seq.*, of the said record, being page 289 of Record No. 691, U. S. circuit court of appeals.

Testimony of N. J. Hoey, found on pages 406, *et seq.*, of the said record, being page 260 of Record No. 691, U. S. circuit court of appeals.

Testimony of W. I. Hodgson, found on pages 422, *et seq.*, of the said record, being page 277 of Record No. 691, U. S. circuit court of appeals.

Report of special committee of the council of the city of New Orleans on drainage taxes, found on pages 349, *et seq.*, of the said record, being page 195 of Record No. 691, U. S. circuit court of appeals.

Testimony of Juste Fontaine, Jr., found on pages 487, *et seq.*, of the said record, being page 352 of Record 691, U. S. circuit court of appeals.

Statement of drainage taxes paid the city of New Orleans, from October 30th, 1888, to June 20th, 1891, found on pages 343, *et seq.*, of the said record, being pages 188 of Record 691, U. S. circuit court of appeals.

Bill, answer, and order appointing receiver, in the case of James W. Peake *vs.* City of New Orleans, No. 1208 of the circuit court of the United States for the eastern district of Louisiana, found on pages 489, *et seq.*, of the said record, being page No. 355 of Record 691, U. S. circuit court of appeals.

Also the agreement described in the note following the city's answer, found on page 496 of the said record, being page 369 of Record 691, U. S. circuit court of appeals.

Testimony of Juste Fontaine, Jr., taken anew in this proceeding before the Honorable A. G. Brice, master.

Testimony of James B. Guthrie, found on pages 364, *et seq.*, of the printed record of this case, No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 213 of Record No. 691, U. S. circuit court of appeals.

Testimony of J. W. Gurley, found on pages 386, *et seq.*, of the said Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 237 of Record No. 691, U. S. circuit court of appeals.

Testimony of Joseph Desposito, found on pages 432, *et seq.*, of printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 289 of Record No. 691, U. S. circuit court of appeals.

Testimony of N. J. Hoey, found on pages 406, *et seq.*, of printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 260 of Record No. 691, U. S. circuit court of appeals.

Testimony of W. I. Hodgson, found on pages 422, *et seq.*, of the printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found on page 277 of Record No. 691, U. S. circuit court of appeals.

Report of special committee of the council of the city of New Orleans on drainage taxes, found on pages 349, *et seq.*, of the printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 195 of Record 691, U. S. circuit court of appeals.

Testimony of Juste Fontaine, Jr., found on pages 487, *et seq.*, of the printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 352 of Record 691, U. S. circuit court of appeals.

Statement of drainage taxes paid the city of New Orleans, from October 30th, 1888, to June 20th, 1891, found on pages 343, *et seq.*, of printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 188 of Record 691, U. S. circuit court of appeals.

Bill, answer, and order appointing receiver, in the case of James W. Peake *vs.* City of New Orleans, No. 12008 of the circuit court of the United States for the eastern district of Louisiana, found on pages 489, *et seq.*, of printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found on page 355 of Record 691, U. S. circuit court of appeals.

Agreement described in the note following the city's answer, found on page 496 of the printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found on page 369 of the Record 691, U. S. circuit court of appeals.

Testimony of Juste Fontaine, Jr., taken anew in this proceeding before the Honorable A. G. Brice, master.

NOTE.—Copied at page 44, *et seq.*, of this transcript.

Exceptions to Report of A. G. Brice, Special Master.

Filed March 10th, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Exceptions taken by defendant to the report herein made by the Hon. A. G. Brice, special master herein, on the claims of intervenors, save and excepting that of James Jackson.

First. That there is error in charging defendant with liability for the whole of the uncollected assessments against private property, or property owned by private persons, because the evidence before said master shows that all such taxes as could be or were susceptible of

collection have been collected and paid over to the parties and purposes for which they were assessed.

Second. That the advantages and the decree herein, under which this reference is made extend only to such warrants as were used in payment of the property purchased by the act before G. Legardeur, notary public, of date June 7, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amount*ing* to $153,750.00 and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the circuit court of appeals and of the supreme court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden, against the city of New Orleans; that of said warrants, besides those issued in settlement of said claim for damages, the sum of $20,000.00 were issued, as will appear by the express terms of the said act in satisfaction of that amount of drainage taxes collected by the city of New Orleans prior to June 6, 1876, and applied to general-fund purposes, and hence, that as to these warrants, in any event, there could be no recovery or allowance made; that in any event, the decree in the suit of J. W. Peake *vs.* City of New Orleans, No. 11614 of the United States circuit court for the eastern district of Louisiana, -as *res adjudicata* in favor of this defendant.

That although there is no mark or sign upon any of the said warrants, which were issued in payment of the price of the property purchased, which were given in settlement of the claim for damages, and which were executed and delivered in payment for drainage work which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payment of the price of said property, and which were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution, first for the payment of the price of the property purchased, next to the settlement of the claim for damages, and lastly for the payment for work mentioned in said notarial act; that all of said warrants bear date June 6, 1876, the first one bearing the number 313, and ran up to and inclusive of the number 402, as is shown by the statement of the said warrants contained in the record, as well as the warrants themselves, offered in evidence.

That from an examination of the said warrants, and a comparison of their numbers, it will be seen, that with the issuance of warrant No. 332 there had been reached an issue of $150,000.00, adding to which warrant 333, for $5,000.00, would make a total issue of $155,000.00, or a difference of $1,250.00 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.

Agreement.

Filed March 24, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

It is hereby stipulated and agreed, that the following shall be pasted over the last nine lines at the bottom of the first page of exceptions to the master's report herein, to stand in lieu thereof, to wit:

"preme court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden against the city of New Orleans; that of said warrants, besides those issued in settlement of said claim for damages, the sum of $20,000.00 were issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the city of New Orleans prior to June 6, 1876, and applied to general-fund purposes."

That the above states the question which was argued on the hearing of the exceptions, and not the question, in manner and form, as stated in said exceptions as originally drawn.

It is further stipulated and agreed, that the above matter set out may be considered by the court, whether or not the same was set out, in manner and form as above set forth, in the exceptions filed before the master.

(Signed) RICHARD DE GRAY,
Solicitor for Complainant.
S. L. GILMORE,
City Attorney.
BRANCH K. MILLER,
Solicitor for Def'ts.

March 24, 1900.

Decree.

Filed March 26, 1900.

United States Circuit Court for the Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, JOANNA E. McCROSSIN, Mary E. Warner, and Harry Warner, Substituted,
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

This cause came on to be finally heard at the present term, upon the bill and its amendments, the respondents' answer thereto and the replication of the complainant, and upon the interventions of the warrant-holders who have filed their claims before the master,

the proofs and the master's report and the defendant's exceptions thereto, and was argued by counsel for the respective parishes; whereupon in consideration thereof it was ordered, adjudged and decreed as follows:

First.

It is ordered that the report of A. G. Brice, Esq., master, made pursuant to the decretal of this court dated December 5, 1898, and filed in the clerk's office, March 7, 1900, be, and the same is hereby approved and confirmed, and the exceptions of defendant thereto be overruled.

Second.

The court finds in accordance with the report of said master, and decrees that the defendant is chargeable with and owes drainage taxes assessed against it upon the area of the streets, squares and public places within the several drainage districts of the city of New Orleans, under the provisions of the acts of the legislature of the State of Louisiana as set forth in the bill of complaint, to the amount of one million eight hundred and fifty thousand three hundred and thirty-six and $\frac{52}{100}$ dollars ($1,850,336.52); that the defendant is indebted in said sum to the drainage fund established by the decree of December, 1898, as a trust fund for the benefit of the complainants and of all other holders of drainage warrants similar to those of the complainants who have established their claims before the master; that said fund so due and owing by the defendant is more than sufficient in amount to pay all the drainage warrants issued by defendant under authority of the act of the legislature of the State of Louisiana of February 24, 1876, in principal and interest, as appears from the master's report, and that the complainants and the intervening claimants are, respectively, entitled to absolute judgments against the defendant for the several amounts in principal, interest, and for costs, as found by the master in his report.

Third.

It is therefore ordered, adjudged and decreed as follows:

1st. That Ann Warner, Joanna E. McCrossin, Mary E. Warner and Harry Warner, the legal heirs of John G. Warner, deceased, who have been substituted to his rights herein, do have and recover absolute judgment against the defendant, The City of New Orleans, for the sum of six thousand dollars, with eight per cent. per annum interest thereon from June 6, 1876, until the same is paid, with all costs of his suit, and that complainants have execution against the defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

2nd. That John Crossley & Sons (Limited), whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of one hundred and forty-nine thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid,

with costs and that it have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

3rd. That Wilder & Co., whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of seven thousand dollars, with interest from June 6th, 1876, at the rate of eight per cent. per annum until paid with costs herein, and the further sum of two hundred and fifteen and $\frac{35}{100}$ dollars, their costs in their suit at law against the city of New Orleans in this court, wherein they recovered judgment on their warrants for the aforesaid sum of seven thousand dollars, and that they have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

4th. That F. J. Gasquet, whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of thirty thousand dollars, with interest from June 6th, 1876, at the rate of eight per cent. per annum until paid with costs and that he have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

5th. That the Suffolk national bank, whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans, for the sum of sixty thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid, with costs, and that it have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

6th. That Mrs. Frank N. Butler, widow in community and as executrix of the will of Frank N. Butler, deceased, and Mary E. Taliaferro, whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of five thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid, with costs, and that they have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

7th. That John J. Donaldson, whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of two thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid, with costs, and that he have execution against the defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the equity rules established by the supreme court.

8th. That Mrs. Eliza J. Lyttle, dative tutor, &c.; whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the

sum of twelve thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid, with costs, and that she have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

All rights of James Jackson, whose claim is mentioned in the report of the master and not reported on by said master, are reserved until the coming in and consideration of the said master's report on said claim, and the bill is retained for that purpose.

(Signed) CHARLES PARLANGE,
U. S. Judge.

New Orleans, March 26, 1900.

Agreement as to Transcript.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

It is agreed that in making up the transcript for the appeal from the decrees entered herein on the 26th day of March, 1900, in favor of the Warner heirs, John Crossley & Sons, Limited, Wilder & Co., F. J. Gasquet, Suffolk National Bank, Mrs. F. N. Butler, and Mrs. Mary E. Taliaferro, John J. Donaldson, and Mrs. Eliza J. Lyttle, that the clerk may omit therefrom the following offerings by the defendant, which concern the claim presented before the master by James Jackson and not yet reported on by him nor acted on by the court, viz:

"3. Hearing and submission in the case of J. W. Peake *vs.* City of New Orleans, No. 11614 United States circuit court for the eastern district of Louisiana, as shown by an extract from the minutes of said court found on pages 102 *et seq.*, of the printed record of said cause."

"4. Agreement as to the transcript in said case, as found on pages 779 of said printed record."

"6. Motion and order for appeal, and bond for appeal, in the same cause, as found on page 780 of said record."

"8. Report of O. B. Sansum, master, in J. W. Peake *vs.* City of New Orleans, No. 11614 United States circuit court for the eastern district of Louisiana, as found in the printed record of said case pp. 49 to 94 inclusive."

And it is admitted that the following offers made by defendant before the master are already in the United States circuit court of appeals in the printed record of this case, to wit: Bill, answer and decree in the case of Peake *vs.* New Orleans, No. 11614 U. S. circuit court, found on pages 142, 160, 359 of Supreme Court Record in the case of New Orleans *vs.* Warner, are to be found as follows:

1st. Said bill and answer on pages 185 and 310 of Record No. 364 U. S. circuit court of appeals, and said decree on page 207 of Record 691, United States circuit court of appeals.

2nd. Intervening bill of James Jackson, found on page 358 of said Supreme Court Record, is found on page 205 of Record 691 U. S. circuit court of appeals.

3rd. Petition, answer and judgment in Jackson *vs.* New Orleans found on pages 361, 362, 363 of said Supreme Court Record are found on pages 208, 209, 210 and 211 of Record 691 U. S. circuit court of appeals.

And said offerings being already in the transcript of record in this case already on file in the United States circuit court of appeals it is agreed that the same be *ad*mitted from the present transcript.

(Signed) S. L. GILMORE, *City Att'y,*
(Signed) BRANCH K. MILLER,
Solicitor- for Defendant.
(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

Motion and Order for Appeal.

Filed April 6th, 1900.

United States Circuit Court, Eastern District of Louisiana. In Equity.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

And now comes the respondent, The City of New Orleans, by Samuel L. Gilmore, city attorney, and Branch K. Miller, its solicitors, in open court, and on suggesting to the court that respondent conceives itself aggrieved by, and that there is error in, the final order or decree of this court rendered and signed on the 26th day of March, 1900, and that respondent desires to appeal therefrom, the assignment of errors this day filed being duly considered,

It is ordered, in open court, that respondent, The City of New Orleans, be allowed an appeal from the said order or decree, without supersedeas, returnable to the United States court of appeals for the fifth circuit, within thirty days from the date of the entry hereof, upon respondent furnishing bond, conditioned according to law, in the sum of five hundred dollars, with good and solvent security.

(Signed) CHARLES PARLANGE,
U. S. Judge.

New Orleans, La., April 6th, 1900.

Assignment of Errors.

Filed April 6th, 1900.

United States Circuit Court, Eastern District of Louisiana. In Equity.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

And now, on the 5th day of April, 1900, came the said respondent, by Samuel L. Gilmore, city attorney, and Branch K. Miller, its solicitors, and says that the decrees in the said cause is erroneous, and against the just rights of the said respondent, for the following reasons:

First. That the court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this court on the — day of March, 1900; that the court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second. That from the evidence before the court, accompanying the said report, it conclusively appeared that the dredge-boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the city of New Orleans from Warner Van Norden and the Mexican Gulf & Ship Canal Company, by authentic act before G. Le Gardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the city of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third. That as to the $20,000 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the city of New Orleans to other than drainage-fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of this court, or of the Supreme Court of the United States, in this cause; that the circuit court erred in admitting them to any participation in the fund ascertained by the master to be due by the city of New Orleans, or to their payment out of the same.

Fourth. That as to the remainder of the $320,000 issued, as shown by the said act of sale from Van Norden and said company

to the city of New Orleans, that is, the residue after deducting the said $153,750, the value of the dredge-boats, etc., and $20,000, in satisfaction of drainage taxes claimed to have been diverted, to wit, $146,250, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the city of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work by the city of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that, in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750, while, as a matter of fact, the whole amount of the $320,000 of warrants issued by the city *were* decreed to be payable out of the said funds, save $4,000 thereof, which *has* been paid, in which finding the court was in error.

Fifth. That warrants to the extent only of $153,750 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth. That the court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a unit, in which there was error; that the court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750, ascertained as aforesaid.

Seventh. That the court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided,

adversely to respondent, in the prior decrees in this cause, made and entered by this court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been considered by this court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either court; that the circuit court erred in so holding, and should have held the reverse.

Wherefore respondent prays that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the defendant on the exceptions to the report of the said special master.

(Signed) SAMUEL L. GILMORE,
City Attorney,

(Signed) BRANCH K. MILLER,
Solicitors for Defendant.

Bond.

Filed April 7th, 1900.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

Know all men by these presents, that we, The City of New Orleans, as principal, and Robert M. Walmsley, as surety, are held and firmly bound unto John G. Warner, John Crossley & Sons, Wilder & Co., Francis J. Gasquet, The Suffolk National Bank, Succession of Frank N. Butler, and Mary E. Taliaferro, Mrs. Eliza J. Lyttle, natural tutrix, appellees, in the full and just sum of five hundred dollars, to be paid to the said John G. Warner and others above named, appellees, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 7th day of April, in the year of our Lord one thousand nine hundred.

Whereas, lately at a circuit court of the United States for the eastern district of Louisiana in a suit depending in said court, between the said John G. Warner and the other parties above named appellees and the said City of New Orleans, a decree was rendered against the said City of New Orleans and the said City of New Orleans having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said John G. Warner and the other parties above named, citing and admonishing them to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof:

Now, the condition of the above obligation is such, that if the said City of New Orleans shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then

the above obligation to be void; else to remain in full force and virtue.

(Signed) CITY OF NEW ORLEANS,
By A. BRITTIN, *Acting Mayor.*
[SEAL.]
[SEAL.] (Signed) R. M. WALMSLEY.

Approved by—
(Signed) CHARLES PARLANGE,
U. S. Judge.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 89 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had from Dec. 5, 1898, together with all the evidence adduced on the trial of the case of John G. Warner *vs.* The City of New Orleans, No. 12350, of the docket of the said court; except such evidence as has been omitted under the agreements printed at pages 82, 83.

Witness my hand and the seal of said court, at the city of New Orleans, this 7th day of April, A. D. 1900.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 7th day of April, A. D. 1900.

CHARLES PARLANGE, *Judge.*

United States Circuit Court of Appeals for the Fifth Circuit.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees. } No. 928.

It is admitted that the following petition, answer and bills of cost were duly filed with and are a part of the claim of Wilder & Co., that the same were duly offered in evidence before master and constitute a part of the record in this case, and through inadvertence were omitted therefrom, and it is agreed that printed copies thereof

may be attached to the last pages of the printed transcript, constituting pages 74, 75, and following.

New Orleans, April 16, 1900.

RICHARD DE GRAY,
ROUSE & GRANT,
Sol'rs for Appellees.
S. L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Defendant.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

JOHN G. WARNER, Appellee,
vs.
THE CITY OF NEW ORLEANS, Appellant. } No. 12350. In Equity.

On appeal to the honorable United States circuit court of appeals for the fifth circuit from the circuit court of the United States for the eastern district of Louisiana, New Orleans division.

Supplemental Transcript

Of the amended petition, exception and answer, judgment on mandate and judgment of award, and taxed cost bills in the case of Wilder & Company *vs.* City of New Orleans, No. 11380, U. S. circuit court, eastern district of Louisiana, offered and filed before A. G. Brice, master, and offered by complainants on the trial before the court.

Index.

	Page.
Amended petition	1
Exception and answer	3
Judgment on mandate of U. S. circuit court of appeals	4
Mandate	5
Judgment	5
Clerk's certificate	6
Cost bills of clerk U. S. circuit court, clerk U. S. circuit court of appeals, and of the U. S. marshal	7 and 8
Clerk's certificate as to transcript	

Copy of Amended Petition, Exception and Answer, Judgment on Mandate, and Judgment of Award.

Filed before master December 10, 1898, and filed in court March 7th, 1900.

Amended Petition.

Filed Dec. 10, 1894.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

WILDER & Co.
vs.
CITY OF NEW ORLEANS. } No. 11380.

And now come plaintiffs in the above entitled and numbered cause and leave of court being first had and obtained and amend their petition and supplemental petition filed herein, so as to read as follows, to wit:

The petition of C. T. Wilder, H. A. Wilder and of the commercial firm of Wilder and Company, composed of said C. T. Wilder and H. A. Wilder residents of Boston, Massachusetts, and citizens of the State of Massachusetts, respectfully shows:

That petitioners are the holders and owners of two certain drainage warrants each dated June 6, 1876, one for $2,000—one for $5,000—issued by the city of New Orleans, a municipal corporation of the State of Louisiana and a citizen of said State of Louisiana to Warner Van Norden, of the city of New York, a resident and a citizen of the State of New York, who could sue on the same in this hon. court, and by said Van Norden endorsed, which are on file herein, and made part hereof, being part of a lot of $320,000—delivered for the purchase of certain property described in an act of sale passed before G. Le Gardeur, Jr., notary public, dated June 7, 1876, filed herewith and made part hereof. All issued and delivered under and pursuant to an act of the legislature approved March 24, 1876, being No. 16 of that year, and payable out of drainage-tax assessments, created under and pursuant to the following described acts of said legislature of Louisiana, to wit: Act No. 165 approved March 18, 1858, No. 191 approved March 17, 1859, No. 57 approved March 1, 1861, and act No. 30 of the year 1871.

Petitioners allege amicable demand and refusal to pay.

Wherefore, petitioners pray for the citation of and after due proceedings judgment against said city of New Orleans as assignee, transferee and subrogee under act 30 of the legislature of the State of Louisiana of all the rights, powers and facilities possessed by the drainage commissioners of the several drainage districts referred to in said act, and act No. 165 of March 18, 1858, act No. 191 of March 17, 1859, act No. 57 of March 1, 1861, of the legislature of the State of Louisiana and the various acts of the said legislature supple-

mentary thereto and amendatory thereof or in anywise pertaining to the drainage of New Orleans and Jefferson and charged with the liabilities and responsibilities imposed under said acts for the sum of $7,000—seven thousand dollars—with 8 % interest per annum from June 6, 1876, until paid and all costs, payable out of drainage-tax assessments and judgments created under and in pursuance of said acts No. 165 of 1858, No. 191 of 1859, No. 57 of 1861, and act No. 30 of 1871 and act No. 16 of March 24, 1876.

Petitioner- further prays for all general relief.

(Signed) RICHARD DE GRAY,
CHAS. S. RICE, *Of Counsel.*

Let the within amended petition be filed and process issue.
New Orleans, Dec. 10, 1894.

(Signed) CHARLES PARLANGE, *Judge.*

Exception and Answer.

Filed January 5, 1895.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

WILDER & CO.
vs.
CITY OF NEW ORLEANS. } No. 11380.

Now into court comes the City of New Orleans, and for peremptory exception to plaintiff's demand, says: That this suit is improperly prosecuted against the said city, all powers and liabilities appertaining to the drainage fund or tax having been withdrawn from said city, and vested in a receiver, by decree of this honorable court in suit of J. W. Peake *vs.* The City of New Orleans, No. 12008 of the docket of this honorable court.

That since said decree the city is without authority to stand in judgment, and this suit must be prosecuted against said receiver, and not against said city.

Wherefore, exceptor prays that this exception be maintained and that exceptor be dismissed from this suit with its costs.

But should this exception be overruled, said City of New Orleans, without waiving the same, for answer to plaintiff's demand says:

That it denies all and singular the allegations of plaintiff's petition except in so far as may hereinafter be admitted.

Further answering, defendant says that any and all drainage warrants that may have been issued by the city of New Orleans were issued by said city not in its character as a municipal corporation, but as a statutory trustee of the drainage fund.

That said trust has terminated by the appointment of a receiver, as aforesaid, all the assets and property of the drainage fund received by said city as trustee have been by said city turned over and

transferred to the said receiver, and the city is without authority or liability to stand in judgment in the premises.

Wherefore, defendant prays that plaintiff's demand be rejected with costs, and that, should there be judgment herein, said judgment should be restricted for payment to the drainage funds in the hands of the drainage receiver, and for general relief.

(Signed) HORACE L. DUFOUR,
Assistant City Att'y.

Judgment on Mandate of the U. S. Circuit Court of Appeals Awarding a New Trial.

Extract from the Minutes, April Term, 1898.

NEW ORLEANS, FRIDAY, *May* 6, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

WILDER & Co. *vs.* CITY OF NEW ORLEANS. } No. 11380.

On motion of C. S. Rice, R. De Gray and Rouse & Grant, attorneys for plaintiffs and upon their suggestion that the judgment rendered herein in favor of the defendant on the 5th and signed on the 15th day of February, 1895, has been reversed by the United States circuit court of appeals for the fifth circuit by its final decree dated April 12, 1898, as appears from the mandate of said court of appeals filed herewith:

It is now ordered that said mandate be filed and recorded, and in accordance with the directions therein contained that said judgment of this court rendered on the 5th and signed on the 15th day of February, 1895, be set aside and annulled, and that a new trial be granted the plaintiffs.

Mandate.

No. 409.

U. S. Circuit Court of Appeals for the Fifth Circuit, Nov. Term, 189–.

WILDER & Co. *vs.* CITY OF N. O. } No. 11380.

"And whereas, in the present term of November, in the year of our Lord one thousand eight hundred and ninety-seven the said cause came on to be heard before the said United States circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof,

It is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby

reversed, and this cause remanded to said circuit court with instruction to award a new trial.

It is further ordered and adjudged that the defendant in error The City of New Orleans be condemned to pay the costs of this cause in this court, for which execution may issue out of said circuit court.

April 12, 1898."

Judgment.

Extract from the Judgment Book No. 16, fo. 102.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division, April Term, 1898.

NEW ORLEANS, TUESDAY, *May* 24, 1898.

Court met pursuant to adjournment.

Present: Hon. Charles Swayne, district judge.

WILDER & CO.
vs.
THE CITY OF NEW ORLEANS. } 11380.

By reason of the verdict of the jury herein and in accordance therewith: It is ordered, adjudged and decreed that the plaintiffs, Wilder & Co., do have and recover of and from the defendant, The City of New Orleans, the sum of seven thousand dollars ($7,000.00) with 8 % interest per annum from June 6, 1876, until paid and all costs, payable out of drainage-tax assessments and judgments created and rendered under and in pursuance of said acts No. 165 of 1858, No. 191 of 1859, No. 57 of 1861 and No. 30 of 1871 and act No. 16 of March 24, 1876.

Judgment rendered May 24, 1898.

Judgment signed May 28, 1898.

(Signed) CHAS. SWAYNE, *Judge.*

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the U. S. circuit court for the eastern district of Louisiana, do hereby certify the foregoing to be a true copy of the original amended petition, exception and answer, judgment on mandate of U. S. circuit court of appeals, and judgment of award, all on file in this office, and now of record in the cause entitled Wilder & Company *vs.* The City of New Orleans, and numbered 11380 of the docket of this court.

Witness my hand and seal of said court, at the city of New Orleans, La., this 7th day of December, A. D. 1898.

[SEAL.] (Signed) E. R. HUNT, *Clerk,*
By H. J. CARTER, *Dy Clerk.*

Cost Bills.

Filed before Master A. G. Brice, Dec. 10, 1898, and returned and filed in court March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

NEW ORLEANS, *Dec.* 7, 1898.

WILDER & CO. *vs.* THE CITY OF N. O. } No. 11380.

Clerk's costs	$69 75
Attorney's docket fee, 2 trials at $20	40 00
	$109 75

In this case I certify that the taxed costs of clerk and attorneys' fees amount to one hundred and nine and $\frac{75}{100}$ dollars $109.75.

Attest: (Signed) E. R. HUNT, *Clerk*,
By J. H. C.

United States Circuit Court of Appeals, Fifth Circuit.

WILDER & COMPANY *vs.* CITY OF NEW ORLEANS. } No. 409. Taxed Against City of New Orleans.

Clerk's Costs.

Docketing cause and filing record	$5 00	
Transfer to subsequent docket	3 00	
2 appearance-	50	
Filing 29 papers	7 25	
Filing briefs for plaintiff in error	5 00	
Filing briefs for defendant in error	5 00	
Entering 1 orders	20	
Entering submission	20	
Entering judgment	1 00	
Mandate	5 00	
Supn., &c.	11 75	
Am't brought forward		$43 90
Att'ys' docket fee, De Gray and others	$20 00	
Cost of printing record	28 20	
		48 20
Total		$92 10

A true copy cost bill.
Taxed by—
J. M. McKEE, *Clerk*. [SEAL.]

J. V. Guillotte, United States marshal.

Office of United States marshal, eastern district of Louisiana.

NEW ORLEANS, *Dec.* 7, 1898.

In the Circuit Court of the United States.

WILDER & Co.
vs.
CITY OF NEW ORLEANS. } No. 11380.

The marshal's costs due J. V. Guillotte herein amounts to thirteen and $\frac{50}{100}$ dollars.

$13.50.

(Signed) T. I. GALBRETH,
Deputy U. S. Marshal.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk U. S. circuit court for the eastern district of Louisiana, do hereby certify the foregoing seven and one-half ($7\frac{1}{2}$) pages do contain a true copy of the amended petition, exception and answer, judgment on mandate and judgment of award, and of the taxed cost bills in the case of Wilder & Company *v.* City of New Orleans, No. 11380 of the docket of said court, and to be filed as a supplemental transcript of appeal in the case of John G. Warner *vs.* City of New Orleans, No. 12350 of the docket of the said court, in the honorable U. S. circuit court of appeals for the fifth circuit.

Witness my hand and seal of said court, at the city of New Orleans, State of Louisiana, this 16th day of April, A. D. 1900.

E. R. HUNT, *Clerk*,
[SEAL.] By H. J. CARTER, *Dy Clerk.*

United States Circuit Court of Appeals, Fifth Circuit.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees. } No. 928.

Appeal from the United States circuit court, eastern district of Louisiana.

It is hereby stipulated and agreed that the act of sale of the Mississippi & Mexican Gulf Ship Canal Company and Warner Van Norden to the City of New Orleans, passed before Gustave Le Gardeur, notary public, June 7th, 1876, offered in evidence before the master, and on the trial of the exceptions to the report of the said master in the circuit court, not found in the printed transcript herein, being omitted therefrom by inadvertence, shall be made a part of the transcript of the record of appeal herein; that the said act of sale being already on file in this court, in Record No. 364, pages 125 *et sequitur*, shall not be incorporated in this transcript, but shall be read

and used as found in the said record, to the same effect as though incorporated in the record of this appeal.

RICHARD DE GRAY,
Solicitor for Complainant.
S. L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Defendant.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1899.

MONDAY, *April* 23, 1900.

(Extract from Minutes.)

CITY OF NEW ORLEANS
vs.
JOHN G. WARNER ET ALS.

This cause was regularly called this day and submitted to the court after argument by Mr. B. K. Miller, for the appellant, and by Mr. Richard De Gray and Mr. Jno. D. Rouse, for the appellees.

November Term, 1899.

TUESDAY, *May* 1, 1900.

(Extract from Minutes.)

CITY OF NEW ORLEANS
vs.
JOHN G. WARNER ET ALS.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be and the same is hereby affirmed.

It is further ordered, adjudged and decreed, that the appellant, The City of New Orleans, and the surety on the appeal bond herein, Robert M. Walmsley, be condemned, *in solido*, to pay the costs of this cause in this court for which execution may be issued out of said circuit court.

United States Circuit Court of Appeals, Fifth Circuit.

CITY OF NEW ORLEANS, Appellant,
versus
JOHN G. WARNER ET ALS., Appellees. } No. 928.

Appeal from the United States circuit court, eastern district of Louisiana.

To the honorable the United States circuit court of appeals for the fifth circuit:

The petition of The City of New Orleans, appellant, respectfully prays for a rehearing herein, on the following grounds, to wit:

First. That the court is in error in its finding that all the questions and issues urged by appellant upon its appeal have been decided adversely to the City of New Orleans, and foreclosed against her, by the opinions and decrees of the Supreme Court of the United States in Warner *vs.* New Orleans, 167 U. S., p. 467, and New Orleans *vs.* Warner, 175 U. S., p. 120, and in support of this application respectfully asks the court to consider the original briefs and oral argument made herein on behalf of the city of New Orleans.

Petitioner files herewith, as part hereof, a copy of the assignment of errors, and asks that it be taken and considered as part of this petition, the same as though fully incorporated at length therein.

S. L. GILMORE,
City Attorney.
BRANCH K. MILLER,
Solicitors for Defendant.

Assignment of Errors.

First. That the court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this court on the — day of March, 1900; that the court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second. That from the evidence before the court, accompanying the said report, it exclusively appeared that the dredge-boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the city of New Orleans from Warne, Van Norden and the Mexican Gulf & Ship Canal Company, by authentic act before G. Le Gardeur, Jr., notary public, of date June 7, 1876, were of the value of $153,750 under the appraisement made pursuant to the act of the General Assembly of Louisiana No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the city of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment

of the purchase price of property, and hence not entitled to the benefits of the decree in this cause.

Third. That as to the $20,000 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the city of New Orleans to other than drainage-fund purposes, there was no warrant or authority in law, or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of this court, or of the Supreme Court of the United States, in this cause; that the circuit court erred in admitting them to any participation in the fund ascertained by the master to be due by the city of New Orleans, or to their payment out of the same.

Fourth. That as to the remainder of the $320,000 issued, as shown by the said act of sale from Van Norden and said company to the city of New Orleans, that is, the residue after deducting the said $153,750, the value of the dredge-boat-, etc., and $20,000 in satisfaction of drainage taxes claimed to have been diverted, to wit, $146,250, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the city of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which in any event would be a condition precedent under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees, and to charge therefor at the rate of 50 cents per square yard for each class of work, while the assumption of this work by the city of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750, while, as a matter of fact, the whole amount of the $320,000 of warrants issued by the city *were* decreed to be payable out of the said funds,

save $4,000 thereof, which has been paid, in which finding the court was in error.

Fifth. That warrants to the extent only of $153,750 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterward to have done what there was no right to do.

Sixth. That the court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a *a* unit, in which there was error; that the court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750 ascertained as aforesaid.

Seventh. That the court erred in holding that all questions raised by the exceptions to the master's report were foreclosed or decided adversely to respondent, in the prior decrees in this cause, made and entered by this court and by the Supreme Court of the United States; that the grounds of said exceptions, and the issues raised by the latter, had never been considered by this court or by the Supreme Court of the United States, and hence had not been decided or passed upon at all by either court; that the circuit court erred in so holding, and should have held the reverse.

November Term, 1899.

MAY 9, 1900.

(Extract from Minutes.)

CITY OF NEW ORLEANS
vs.
JOHN G. WARNER ET ALS. } No. 928.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1899.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees. } No. 928.

Appeal from the circuit court of the United States for the eastern district of Louisiana.

(Before Pardee, McCormick, and Shelby, circuit judges.)

By the COURT: All the questions raised on this appeal have been settled adversely to the appellant in the protracted litigation of this case. See Warner *vs.* New Orleans, 167 U. S., 462; Warner *vs.* New Orleans, 59 U. S. App., 131, and New Orleans *vs.* Warner, 175 U. S., 120.

It follows that the decree of the circuit court herein appealed from must be affirmed, and it is so ordered, with costs, but no damages.

United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 91 pages, numbered from (*a*) to 90 inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court in the case of The City of New Orleans *vs.* John G. Warner *et als.*, No. 928, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 9th day of May, A. D. 1900.

[SEAL.] J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which The City of New Orleans is appellant and Ann Warner, Joanna E. McCrossin, Mary E. Warner, and Harry Warner, sole heirs-at-law to John G. Warner, deceased, *et al.* are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the eastern district of Louisiana, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of June, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Fifth Circuit.

THE CITY OF NEW ORLEANS, Appellant,
vs.
ANN WARNER ET ALS., Appellees. } No. —.

It is hereby stipulated and agreed that the certified copy of the transcript of record of this cause now in the Supreme Court of the United States, filed therein with the petition of the City of New Orleans to the said court for certiorari, and now on file in the office of the Supreme Court of the United States, shall be taken, consid-

ered, and construed as a return to the said writ of certiorari granted by the Supreme Court herein.

(Signed) R. DE GRAY,
" J. D. ROUSE,
" WM. GRANT,
Attorneys for Ann Warner et als.

(Signed) BRANCH K. MILLER,
Attorney for Board of Liquidation of the City Debt.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing one page contains a true and perfect copy of the agreement of counsel filed in the case of The City of New Orleans *vs.* Ann Warner *et als.*, as fully and completely as the same now remains of record and on file in my office.

[SEAL.] In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 7th day of July, A. D. 1900.

J. M. McKEE,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

Received the within writ July 5th, 1900.

For return to within writ, I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, by direction of the judges of said court, do herewith annex and make a part of this return a certified copy of the agreement of counsel filed in my office, and do certify that the transcript of the record of the cause stated in the within writ now on file in the office of the clerk of the Supreme Court of the United States is a true, full, and perfect transcript of the record and all proceedings had in said cause in the United States circuit court of appeals for the fifth circuit, as the same now remains of record and on file in my office.

[SEAL.] Given under my hand and seal of said court hereto affixed, at the city of New Orleans, this July 7th, A. D. 1900.

J. M. McKEE,
Clerk of the U. S. Circuit Court of Appeals, Fifth Circuit.

Endorsed: File No., 17763. Supreme Court of the United States. No. 281. October term, 1900. The City of New Orleans *vs.* Ann Warner *et al.*, heirs, &c., *et al.* Writ of certiorari and return. Filed July 10, 1900.

Supreme Court of the United States, October Term, 1900.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees. } No. —.

It is stipulated between the parties in this case that only the following portions of the record of the former appeal, No. 172 of the October term of 1899, and of the supplemental record of the pro-

ceedings since had in the cause filed under the No. 281 of the October term, 1900, need be printed for the purposes of this appeal:

1st. The original bill of John G. Warner, to be found in the original printed record, No. 172 of the October term of 1899 of the Supreme Court, beginning at p. 1, and amendment to the bill, at p. 185; but all exhibits to the bill are to be omitted.

2nd. The answer of The City of New Orleans to said bill in said original record, No. 172, beginning p. 186.

3rd. The agreement dated June 7th, 1876, for sale of dredge-boats, &c., in said original record, beginning at p. 97.

4th. Ordinance No. 3479, in said record at p. 104.

5th. " 3539, " " "

6th. Appraisements of T. S. Hardee, beginning at p. 91 of said record.

7th. Specimen copy of one of the drainage warrants, in said record at p. 109.

8th. Petition of City of New Orleans for writ of certiorari, filed in United States Supreme Court in said No. 172 to review said decree, together with the assignment of errors filed at the hearing.

9th. The opinion and decree of the court of appeals on the last appeal.

10th. The petition of the City of New Orleans for a writ of certiorari in this case and answer thereto of the appellees, and transcript of record of appeal to circuit court of appeals filed therewith.

It is further agreed that either party may refer to and use in the trial of the present appeal any part of said original or supplemental records with like effect as if the same had been reprinted and incorporated in the portions printed under this stipulation.

It is further agreed that any party may at any time before the *the* cause is decided have printed for the use of the court any other portions of the record that may be desired by him.

New Orleans, La., Oct. 9, 1900.

RICHARD DE GRAY,
J. D. ROUSE,
WM. GRANT,
Attorneys for Appellees.
BRANCH K. MILLER,
Solicitor for City of New Orleans.

Endorsed: File No., 17,763. Supreme Court U. S., October term, 1900. Term No., 281. The City of New Orleans, petitioner, *vs.* Ann Warner *et al.*, heirs-at-law, &c., *et al.* Stipulation as to printing record. Filed October 12, 1900.